Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Following remand of this case for consideration of this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), did the Eleventh Circuit disregard this Court's holding when it reinstated its 1999 opinion permitting prayers by students and nonschool persons over the public address system at football games, compulsory school assemblies, and graduation ceremonies and over the classroom intercom?

2. Absent any evidence that the state has created a public forum in its schools, does it violate the Establishment Clause for school officials to permit both students and nonschool persons to offer group prayer before a captive audience of K-12 students in classrooms, school-sponsored assemblies, sporting events and graduation exercises using the machinery of the state, including compulsory attendance laws, public address and intercom systems?

LIST OF ALL PARTIES TO THE PROCEEDING

Michael Chandler and Jesse Chandler, a minor child, by and through his father and next friend, Michael Chandler, Petitioners/Plaintiffs.

Don Siegelman, present Governor of Alabama, in the Governor's official capacity as president of the Alabama State Board of Education; Forrest H. "Fob" James, Jr., former Governor of the State of Alabama; William H. Pryor, Attorney General of the State of Alabama; Alabama State Board of Education; Dr. Ed Richardson, in his official capacity as Superintendent of the State Board of Education; Dr. Stephanie Bell, in her official capacity as a member of the State Board of Education; David Byers, in his official capacity as a member of the State Board of Education; Bradley Byrne, in his official capacity as a member of the State Board of Education; Mary Jane Caylor, in her official capacity as a member of the State Board of Education; Dr. Ethel Hall, in her official capacity as a member of the Alabama State Board of Education; G.J. "Dutch" Higginbotham, in his official capacity as a member of the Alabama State Board of Education; Sandra Ray, in her official capacity as a member of the State Board of Education; Mary Etta Bailey, in her official capacity as a member of the DeKalb County Board of Education; Dot D. Burke, in her official capacity as a member of the DeKalb County Board of Education; Greg Buttram, in his official capacity as a member of the DeKalb County Board of Education; Willard A. Israel, former member of the DeKalb County Board of Education; Tommie Johnson, in his official

capacity as a member of the DeKalb County Board of Education; Richard R. Land, in his official capacity as Superintendent of the DeKalb County Board of Education; Weldon Parrish, former Superintendent of the DeKalb County Board of Education; Jimmy Wilbanks, in his official capacity as a member of the DeKalb County Board of Education; Johnny Young, in his official capacity as a member of the DeKalb County Board of Education.

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CITATIONS OF OPINIONS AND ORDERS

The order of the United States Circuit Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reprinted as Appendix I to the petition. The opinion of the Eleventh Circuit reinstating its earlier opinion is reported at 230 F.3d 1313 (11th Cir. 2000) and is reprinted as Appendix A. Its earlier opinion is reported at 180 F.3d 1254 (11th Cir. 1999) and is reprinted as Appendix B. The opinion of this Court vacating the earlier opinion and remanding is reprinted as Appendix C. The opinion of the district court granting in part and denying in part the motion for partial stay of the injunction is reported at 998 F. Supp. 1255 (M.D. Ala. 1997) and is reprinted as Appendix D. The opinion of the district court regarding the constitutionality of Alabama's school-prayer statute is reported at 958 F. Supp. 1550 (M.D. Ala. 1997) and is reprinted as Appendix E. The district court's permanent injunction is reported at 985 F. Supp. 1062 (M.D. Ala. 1997) and is reprinted as Appendix F. The opinions of the district court relating to the issuance of the injunction are reported at 985 F. Supp. 1068 (M.D. Ala. 1997) and 985 F. Supp. 1094 (M.D. Ala. 1997) and are reprinted as Appendix G and Appendix H.

BASIS FOR JURISDICTION

The court of appeals entered its judgment on October 19, 2000. The petition for rehearing en banc was denied on April 13, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS and STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of Alabama Code § 16-1-20.3 (1975 & 1993 Supp.) is set forth in Appendix J.

STATEMENT OF THE CASE

In 1993, Alabama enacted its fourth school-prayer statute within a 15-year period. The operative portion of the statute provides:

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions, shall be permitted

> during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code §16-1-20.3(b) (1975 & 1993 Supp.).

On February 1, 1996, Michael Chandler and his son Jesse sued, challenging the constitutionality of the statute both facially and as applied in DeKalb County, Alabama where the family has lived and worked and where Jesse attends one of eight K-12 schools. He is now a senior and is expected to graduate on May 23, 2001.[1]

The trial court concluded, in findings not challenged on appeal, that the following religious activities had taken place in DeKalb County schools. DeKalb admitted that these activities were applications of the school-prayer statute.

•**Christian prayers over the loudspeaker at high school football games offered by students or clergy**. For several years prior to suit, Christian prayers were recited by students or clergy over the loudspeaker at DeKalb County football games. DeKalb County stipulated to control over access to the public-address system at home football games. There is no evidence that DeKalb County

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[1] To the extent that mootness may be a concern at a later date, the petitioners ask the Court to follow *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and vacate the affected portions of the lower courts' decisions. *See also Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995) (vacating as moot lower court ruling).

ever set aside use of the system for student expression or otherwise established a public forum for the discussion of other topics or viewpoints. Nor is there evidence that prayers from non-Christian religious traditions were offered or that any other type of speech, other than announcements related to the games, was broadcast. In fact, the superintendent stated the prayers were a "tradition" that would continue despite court rulings to the contrary. He also stated that DeKalb's official policy was "to allow religion in the schools whenever possible."

Specimen prayers before and after suit were videotaped and entered into evidence. While attendance at football games is not a curricular requirement, most students attend, including students not yet in high school and students who have graduated. Jesse Chandler has attended such football games. In fact, many members of the community attend, including recently graduated students. *See* App. D27-29.

•**Christian prayers in the classrooms as part of orchestrated student activity**. In a number of cases in DeKalb County, students led their peers in corporate prayers or religious devotionals in the classroom or over the intercom during the school day. For example, the teacher would select a student to lead the prayer, or the teacher would give a signal and the students would pray in unison. In Jesse Chandler's homeroom, his teacher selected students to offer prayers or Bible readings and did so herself in the absence of student "volunteers." Students also prayed over the school-intercom system during homeroom. There is no evidence that school officials made the school intercoms available for other speech unrelated

to school business or allowed school clubs to conduct club activities over the intercom system.

•**Christian prayers at compulsory school assemblies**. During the school day, DeKalb County public schools hold assemblies where attendance is required or where students must choose between attendance or study hall. School officials control the assemblies and decide the content of the programs. At these assemblies, students or clergy have led prayers and religious devotionals. For example, assemblies for programs such as D.A.R.E. have featured prayer. Although this drug-awareness program is not compulsory, all fifth-graders, including Jesse Chandler, participated. Both before and after suit, Jesse Chandler attended assemblies where prayers or devotionals were offered.

•**Christian prayers at high-school graduation ceremonies**. For several years prior to suit, graduation prayers, identified as "invocations" or "benedictions," were led by students or clergy. They were listed on preprinted programs separately from valedictory or salutatory addresses, which were presented independently. As stipulated, school officials plan the ceremonies and control the form and content of the graduation programs. There have been no prayers from non-Christian religious traditions, and no speech besides prayer has ever been offered during the prayer segments. Several prayers were videotaped and entered into evidence, and each invokes the name of Jesus. After the suit was filed, the word "invocation" was dropped from the preprinted program at Sylvania School and the words "Class Historian" inserted. For three years in a row, the class historian led the

audience in prayer, just as had taken place during the "invocation" prior to suit. In addition to Sylvania, other schools continued to permit prayer after suit was filed.

•**Other Christian religious activities in the DeKalb County schools.** In addition to the above activities conducted pursuant to the statute, DeKalb County officials permitted ministers and evangelists to speak at school events such as mandatory drug- or AIDS-awareness assemblies and to pray, proselytize, make extended religious remarks, and invite students to church functions. School officials also allowed nonschool persons to enter classrooms to make presentations and distribute Gideon Bibles.

Although school officials promised to intercede to stop religious harassment of students, they did not do so. The trial court found that DeKalb County had permitted classmates' harassment of Jesse Chandler for a period of months. Between October 1996 and April 1997, approximately 175 of 200 students stood and prayed aloud when Jesse entered the lunchroom, on a signal of "One, two, three, pray." Despite complaints from the Chandler family, both the school principal and the superintendent refused to stop the conduct. Jesse was forced to take his lunch alone in a classroom.

On October 23, 1997, DeKalb filed a pleading stating that it wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants whenever he wants to." (App. E12.) On October 29, 1997, the trial court enjoined

DeKalb from "permitting" "school-sponsored or officially sanctioned" prayers. 985 F. Supp. 1062, 1063-65. The word "permitting" tracks the "shall permit" language of the statute that DeKalb contended it applied in sponsoring such prayers.

The district court repeatedly stressed that its injunction reached only "school-organized" or "officially sanctioned" prayer – that is, prayer occurring in situations where school officials actively control the setting and students cannot realistically express opposing views or offer other unsanctioned speech. The injunction explicitly protected students' rights under the federal Equal Access Act (for grades 7-12). (App. F4-F5, F9.) It also allowed students to distribute religious literature to the same extent that they could distribute other literature, to express religious beliefs in school assignments, to wear religious clothing and jewelry, to attempt to persuade their peers on religious issues, and to quietly engage in religious activity during noninstructional time. (*Id.*)

The defendants[2] appealed only those provisions of the injunction prohibiting school officials from "permitting" students' and nonschool persons' religious exercises at "school-sponsored" or "officially sanctioned" activities. The defendants did not challenge a single factual finding on appeal.

The first Eleventh Circuit decision was issued on July 13, 1999. It vacated the injunction, holding that there

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[2] Alabama Governor Forrest H. "Fob" James, Jr. raised only one issue on appeal, arguing that the Bill of Rights does not apply to the state of Alabama.

is no state action when a student or a nonschool "other"[3] prays as part of a school-controlled event. It further held that if school officials fail to permit prayers by students and nonschool "others" during school-sponsored events the officials control, the officials evince unconstitutional hostility toward religion and practice "viewpoint discrimination." Although the panel found fault with only pieces of the injunction – specifically, the trial court's use of the word "permit" with regard to the speech of students and nonschool others – it vacated the entire injunction. In addition, the opinion was filled with language complaining about efforts to "cleanse" religion from the public schools. (*See, e.g.*, App. B15 ("'Cleansing' our public schools of all religious expression, however, inevitably results in the 'establishment' of disbelief – atheism – as the State's religion.").)

After their petition for rehearing *en banc* was denied, the Chandlers petitioned this Court for certiorari. This Court granted the writ, vacated the Eleventh Circuit's opinion, and remanded for further findings not inconsistent with *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). On October 19, 2000, the Eleventh Circuit reinstated its earlier, pre-*Santa Fe* opinion, which held that prayers and devotional activity, albeit delivered

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[3] The Eleventh Circuit explained that its use of the word "student" throughout the opinion should be understood to include all nongovernmental "private parties." (App. B6 at n.6.) It held that "students or other private parties" have a First Amendment right to pray at school-related events. (App. B22. *See also* App. B25.) In DeKalb County, the nongovernmental private parties offering prayers were Christian ministers and evangelists. (*See* App. G27, G43, G60.)

to captive student audiences using school loudspeakers at school events or in the classroom, were "private" speech and that enjoining this speech amounted to "viewpoint discrimination."

The Chandlers again petitioned for rehearing *en banc*. The *en banc* petition was denied April 13, 2001. This petition for certiorari, the Chandlers' second, timely follows.

REASONS FOR GRANTING THE WRIT

First, this petition places in issue this Court's province to pronounce the law of the land — on a matter of the most profound importance: the establishment of religion. This Court's *Santa Fe* decision repudiated each and every rationale upon which the Eleventh Circuit's *Chandler I* decision rested. Despite *Santa Fe*'s clear teaching, the Eleventh Circuit reinstated its earlier opinion as if *Santa Fe* had never been decided. Second, even if *Santa Fe* had never been decided, this Court has never allowed--and other Circuits do not allow--the machinery of the state to be used to sponsor religion, especially in the public schools. The Eleventh's Circuit decision is revolutionary among the Circuits and irreconcilable with this Court's precedents.

I.

The Eleventh Circuit's Decision Directly Contradicts this Court's Decision in *Santa Fe*

Last Term, in *Santa Fe*, this Court struck a school-board "policy that permits, but does not require, prayer initiated and led by a student," struck it on its face, and struck it even when it purportedly created a species of

"equal access" for secular speech. 530 U.S. at 294.

This Court in *Santa Fe* did not obscure the reasons for its holding: The "student-initiated" prayers were "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message [was] broadcast over the school's public-address system, which remains subject to the control of school officials." *Id.* at 307. This Court pointedly noted that "[i]t is in a setting such as this that '[t]he board has chosen to permit' prayer." *Id.*

Despite this Court's clear teaching on coercion, endorsement, and the school environment, the Eleventh Circuit on remand held that school officials *must* permit prayers initiated by students and nonschool persons over the public-address system at football games, compulsory school assemblies, at graduation ceremonies--even in classrooms. No decision could be more antithetical to *Sante Fe* than the Eleventh Circuit's.

A. The Eleventh Circuit Ignored *Santa Fe*'s Teaching about Private v. State-Sponsored Prayer, Focusing Instead on the Identity of the Speaker.

The school-sponsored context, and not the speaker's identity, dictated this Court's finding of an Establishment Clause violation in *Santa Fe*. Prayers "at government-sponsored, school-related events," *id.* at 301, involve "both perceived and actual endorsement of religion." *Id.* at 305. They bear "the imprint of the State and thus put school-age children who object[] in an untenable position." *Id.*

(*quoting Lee v. Weisman*, 505 U.S. 577, 590 (1992)). Prayer in this setting, *Santa Fe* teaches, cannot "be regarded as 'private speech.'" *Id.* at 302.

Yet the Eleventh Circuit explicitly found such speech in such a setting to be "private," as long as it is not uttered by a school official.[4]

In *Santa Fe* this Court rejected the very argument that prayers in this setting are "private" speech merely if uttered by students,[5] and explicitly found that a private-speech rationale does not apply to, *e.g.*, prayer over the school's p.a. system. *Compare* 530 U.S. at 302, 309-10 (noting distinction between government speech endorsing religion and private speech doing the same, but stating that prayers over the p.a. system are not private speech) *with* 180 F.3d at 1258, 1264 (using *Mergens*[6] to support finding

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[4] No one – including the Chandlers and the trial court – has ever contested the right of students to engage in *truly* private prayers, *i.e.*, praying before a test or saying a private grace before meals in the lunchroom. The injunction forbids (and the Eleventh Circuit directed) school officials to permit the praying of audible, corporate prayers that become part of the school-sponsored event at issue. (*Compare* App. B21-B22 *with* App. F4-F7.) The type of prayers reached by the injunction would include a student or member of the clergy using the school microphone and saying to a captive audience, "Let us pray," but not a group of students praying among themselves in the stands when all are free to move around. (*See* App. E23-26; App. D69-D71, D87-91.)

[5] *Chandler* also allows persons *other than students* to pray before a large school-assembled audience using school facilities and equipment over which school officials have plenary control. 180 F.3d at 1257 n.6, 1264.

[6] *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

that such prayers are "private" speech). The Eleventh's Circuit's reinstatement following remand is flatly defiant of this central aspect of *Santa Fe*.

Simply put, this Court held that permitting *a student* to pray did not "turn public speech into private speech," and did not "insulate the school from the coercive element of the final message." *Id.* at 2279. Permitting a *student* to say the prayer over the school microphone, at a school event, before a school-organized audience, is not a "circuit breaker" insulating the school from endorsement any more than the deployment of a student insulates the school from the coercive element of the message. *Compare id.* at 305, 309-10 *with* 180 F.3d at 60-63 & n.15. The Eleventh Circuit treats the fact that a person who is not employed by the school board is the person praying over the intercom as a constitutional cloaking device.[7] But this Court sees past

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[7] The Eleventh Circuit's justification for its notion that student-composed prayers at school-controlled events are "private" involves its correlative assumption about "genuine" (meaning unscripted) prayers. The prayers if unscripted are "genuine" and if genuine are unscripted, and thus "private," so that to proscribe them is to engage in crass censorship. *See* App A8. This holding, the panel states, is "complementary rather than inconsistent" with *Santa Fe*. App. A3. In fact, the Eleventh Circuit disregards the fact that the actual, impermissible prayers at issue in Santa Fe were themselves "genuine": "the particular words used by the speaker are not determined" by anyone but the speaker. 530 U.S. at 305-06. The unscripted nature of the prayers did not save the prayers in *Santa Fe*, however. School control and school context, not the existence of a school-authored script, are what make the Establishment Clause violation, and the Eleventh Circuit is simply mistaken in its insistence that curtailing the violation amounts to censorship: "'Regardless of whether the prayers are¼ *spontaneously initiated* at

formalism and artifice – *Lee*, 505 U.S. at 595--and has explicitly warned the lower federal courts not to "accept what is [an] obviously untrue" rationalization for unconstitutional action or to "turn a blind eye" to context and "social facts." *Id.* at 315. The social fact of a coercive school setting, and a school-owned microphone, cannot be ignored consistent with this Court's Establishment Clause jurisprudence. In *Santa Fe*, this Court found the pressure to conform religiously, in the school context, as unconstitutional as any more direct means the state might employ. *Id.* at 311-12 (*quoting Lee*, 505 U.S. at 593). The simple meaning of this statement is that students, just like school officials, are proscribed from using the machinery of the state to allow students to promote religion from them. The Court of Appeals operated on just the opposite assumption. *Compare id. with* 180 F.3d at 1260, 1263.

The Eleventh Circuit commands school officials to permit the very type of religious activity that this Court has

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these¼school-sponsored events, school officials are present and have the authority to stop the prayer.'" *Id.* at 300 (emphasis added). *See also id.* n.11.

The district court properly protected "genuine" student prayer; it proscribed ONLY prayer that was school-sponsored or officially sanctioned – prayer that in the context connotes governmental endorsement. (*See* App. F1.) It did not proscribe any "student from voluntarily praying at any time before, during, or after the school day." 530 U.S. at 313. Despite the Eleventh Circuit's conflation of "genuine" prayer with student-composed prayer at school-sponsored events, Justice Souter's observation that private prayer spurns the state's microphone remains true. *See Lee*, 505 U.S. at 630-31 (Souter, J., concurring).

forbidden: audible prayer and religious activity in the classroom;[8] prayer and devotional speech over school public- address systems; and prayer and devotional speech by students and nonschool persons at school-controlled events, including assemblies, sporting events and graduation ceremonies. According to the Eleventh Circuit, as long as such prayer is not conducted or commanded by school officials, it must be permitted. (App. A7-8 and App. B21-23.) According to the Eleventh Circuit, prayers by persons who are not employed by the school board have no potential for coercion. 180 F.3d at 1263 n.13. The school setting, the use of the state's machinery, and the religious rights of the audience do not factor in the Eleventh Circuit's calculus.

But the prayers that school officials are required to countenance by the Eleventh Circuit are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," "broadcast over the school's public-address system, which remains subject to the control of school officials" at school-sponsored events. *Compare* 180 F.3d at 1261-63 and App. A5-6 *with* 530 U.S. at 300-01, 307-09. No imaginable circumstances could be more clearly governed by this Court's decision in *Santa Fe*. The principle, the social facts, and many of the operative facts in DeKalb County are identical to those explored in *Santa Fe*. Respectfully, this being so, the Eleventh Circuit is not free to declare a local option on the Establishment Clause that is utterly at odds with this Court's authoritative articulation

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[8] *See, e.g., Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

of the law.

As this Court stated in *Santa Fe*: "[N]othing in the Constitution prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id.* at 313. The injunction vacated by the Eleventh Circuit proscribes only *school-sponsored* or *officially sanctioned* prayer and carefully removes from its ambit truly private prayer. This Court, like the district court, correctly marked the boundaries between state-sponsored and private speech. The Eleventh Circuit has erroneously erased these carefully drawn boundaries.

B. *Santa Fe* Rejected the Eleventh Circuit's Viewpoint Neutrality Theory.

Intimately related to the Eleventh Circuit's "private speech" theory and holding is another theory and holding rejected by *Santa Fe* that "viewpoint neutrality" can be invoked to sanitize Establishment Clause violations. The Eleventh Circuit purportedly locates support for this thesis in an erroneous application of *Mergens* and its progeny.[11] This notion, however, has no support in the record or in this Court's precedents. Respectfully, this theory was wrong before *Santa Fe*, but clinging to it after *Santa Fe* is indefensible.

This Court plainly stated in *Santa Fe* that the

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[8] *See generally* App. B25 (summarily invoking selected forum cases).

Mergens line of cases has no application in the school-sponsored prayer context. *Id.* at 302. *See also id.* at 303 & n.12. Accommodation, as *Mergens* recognizes, is not the same thing as sponsorship. Prayer over the school-owned intercom, however, transcends accommodation, particularly where the social facts indicate a policy to have prayer wherever possible in the school setting. This Court in *Santa Fe* explicitly rejected the argument that school officials' permitting other speech besides prayer means that permitting prayer is merely a "neutral accommodation of non-coerced, private, religious speech." Id. at 301 & n.11. *This Court in* Santa Fe *expressly rejected the argument that a school can divorce itself from an Establishment Clause violation by claiming that its prayers foster "neutrality rather than endorsement." Id.* at 305. This rejected "neutrality versus endorsement" position is exactly the law of the Eleventh Circuit after *Chandler* unless this Court corrects it here. 180 F.3d at 1260.

II.

EVEN IF SANTA FE HAD NEVER BEEN DECIDED, THIS COURT'S LONG-STANDING PRECEDENTS COMMAND REVERSAL.

For over 50 years, this Court's school-prayer holdings have consistently reaffirmed the same basic rules: public school officials may not promote or endorse a particular religion or religion generally, nor may they direct or encourage student participation in religious activities. *Wallace v. Jaffree*, 472 U.S. 38 (1985);

Abington Twp. Sch. Dist. v. Schempp, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Likewise, school officials may not turn over classrooms and other school-controlled events to outside individuals to engage captive student audiences in prayer, religious instruction, or other devotional activity. *Lee v. Weisman,* 505 U.S. 577 (1992); *People ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

As this Court has frequently observed, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." *Lee*, 505 U.S. at 592. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring). This Court recognizes that the public schools exercise tremendous control and influence over schoolchildren who are highly impressionable and subject to peer pressure, even when the school-controlled event is "voluntary," and that "prayer exercises" carry special coercive power. *See Lee*, 505 U.S. at 592-93; *Edwards*, 482 U.S. at 584; *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

The Eleventh Circuit ignored this Court's concern with captive K-12 audiences, particularly the rights of nonadherents of the speaker's religion. *Compare* App. A20 ("[t]hose who do not espouse a speaker's religious belief are free not to listen, and to express their disagreement by not participating in any way") *with Lee*, 505 U.S. at 593 ("It is of little comfort to a dissenter . . . to be told that . . . the act of standing or remaining in silence signifies mere respect, rather than participation."). Under the rubric of protected private speech, the Eleventh Circuit subordinated

the rights of captive audiences of K-12 school children to the putative free-speech rights of their peers and even adult "others" to lead corporate prayer in the classroom, over the school intercom, over the microphone at assemblies, at sporting events, and at graduations. Rather than focusing on the use of the machinery of the state as this Court's precedents command– in the form of mandatory attendance laws, school-sponsored events, classrooms, microphones, and intercoms to convey religious messages – it focused on the identity of the speaker and the proselytizing content of the speech.

The Eleventh Circuit also disregarded this Court's endorsement holdings and gave no consideration to the ways in which permitting prayer and religious activity lends the state's imprimatur to religion. It simply assumed that prayer over the intercom, if not delivered or composed by school officials, was "private" even in the context of a classroom or over a school-owned intercom. But "the Establishment Clause does not limit only the religious content of the government's own communications. Indeed the very concept of endorsement conveys the sense of promoting someone else's message." *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989). *See also Lee*, 505 U.S. at 592 (secondary-school students are likely to perceive school-sponsored religious exercises as an "attempt to employ the machinery of the state to enforce a religious orthodoxy").

Moreover, as Justice Souter has noted, truly "private" prayer neither seeks nor requires a microphone and an audience. Because students "have no need for the machinery of the State to affirm their beliefs, the

government's sponsorship of prayer . . . is most reasonably understood as an official endorsement of religion." *Lee*, 505 U.S. at 630-31 (Souter, J., concurring). It is for this reason that schools may not "permit" their machinery to be used to sponsor prayer. That has been done here, and it is a violation of the Establishment Clause.

The Eleventh Circuit's cramped view of the state involvement necessary to trigger the Establishment Clause (apparently, a school official praying, composing, or directly commanding prayer) conflicts with this Court's precedents and erodes fundamental Establishment Clause values.

III.
BECAUSE THE ELEVENTH CIRCUIT HAS MISAPPLIED THIS COURT'S PRECEDENTS, THE CIRCUITS REMAIN SPLIT.

Before this Court decided *Santa Fe*, there was a split among the circuits, with the Eleventh Circuit, then as now, being the sole dissenter. While *Santa Fe* should have settled matters, it did not. The Eleventh Circuit still stands alone.

In considering whether prayers and religious speech at school-sponsored events fall afoul of the Establishment Clause, the Fifth, Third, Ninth, Second, and Seventh Circuits have asked not who the speaker is, but whether the machinery of the state has been used to endorse religion. Unsurprisingly, these courts, like this Court in *Santa Fe*, reached a conclusion opposite to that of the Eleventh Circuit.

For example, in *Collins v. Chandler Unified School District*, 644 F.2d 759, 761 (9th Cir. 1981), the court found no meaningful distinction between school authorities' permitting and students' directing of religious exercises at school-sponsored assemblies and upheld an injunction prohibiting school officials from "'permitting, authorizing, or condoning the saying of public prayers by students.'" It did so explicitly because it recognized that school officials do not as a practical matter have a "hands-off" attitude toward major school functions and that school officials control access to school facilities. 644 F.2d at 762-63. Likewise, in *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), the Ninth Circuit, following *Santa Fe* and *Lee,* held that a school district would run afoul of the Establishment Clause were it to permit a student to deliver a religious invocation or an overtly proselytizing valedictory address at graduation, using the school's microphone, the school's platform and the audience assembled for the school event.

In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471, 1477-79 (3d Cir. 1996) (*en banc*), the Third Circuit likewise held that even if school officials delegate control over some aspect of a school-sponsored graduation program to students, an Establishment Clause violation may still occur because the program is school-sponsored and *Lee*'s coercive effects can exist with student-led prayer. Similarly, the Second Circuit, in *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), reversed an order that prohibited school officials from preventing student-led prayer during the school day, reasoning that the "closely

organized schooling of young children" rendered "'student-initiated' prayers" at school events "an illusion." 382 F.2d at 1001.

Finally, the Seventh Circuit has rejected the Eleventh Circuit's novel theory that religious activity conducted by nonschool persons is immunized by lack of state action. It has held that, far from immunizing them, the very fact that school officials give nonschool others *permission* to use the machinery of the state, by opening up their classrooms, auditoriums, and captive student audiences to the Gideons, makes these "others" state actors for purposes of the Establishment Clause. *Berger v. Renssalaer Cent. Sch. Corp.*, 982 F.2d 1160, 1165-66 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993).

Likewise, the Third, Ninth, Seventh, and Fifth Circuits have rejected the Eleventh Circuit's viewpoint neutrality justification for an Establishment Clause violation. In all cases, the lack of a public forum was central to their reasoning. In *Blackhorse Pike*, the Third Circuit rebuffed the free-speech justification for prayer led by elected students at graduation because it found no public forum. *See* 84 F.3d at 1477. In *Collins*, the Ninth Circuit found unpersuasive a proffered free-speech justification for student-led prayer at school assemblies because of the constraints of the school setting. *See* 644 F.2d at 762. In *Berger*, the Seventh Circuit found that, where the state opens its classrooms to the Gideons, the "free speech of private actors" rationale fails as a matter of law. *See* 982 F.2d at 1166-67. The *Berger* court noted the distinction between the empty classrooms of the *Mergens* line of cases and the captive audience hearing a school-

endorsed message while seated in those same classrooms. *Id.* The reasoning of *Blackhorse Pike*, *Berger* and *Collins* was vindicated with this Court's *Santa Fe* decision.

The Eleventh Circuit decision sin this case are in defiance of this Court's ruling in *Santa Fe*, and its disregard of settled principles laid down for decades by this Court renders it an anomaly among its sister courts. Because a citizen's rights should not depend on where he or she lives, and this Court has said they do not, the decision should be abrogated by this Court. *See Wallace v. Jaffree*, 472 U.S. 38 (1985) (Bill of Rights applies to the States.

CONCLUSION

Because the Eleventh Circuit's disposition directly contradicts this Court's *Santa Fe* decision, this Court should grant the writ and reverse. In addition, the Court should resolve the conflict among the circuits and provide guidance to them by granting the writ in this case. The Eleventh Circuit's decision should not stand. To the extent that the case becomes moot while the petition is pending, petitioners ask this Court to follow *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995), and vacate the affected portions of the lower court's decisions.

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IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

D. C. Docket No. 96-CV-169-N

MICHAEL CHANDLER, individually and as
next friend of his son, Jesse Chandler,
et al.,

Plaintiffs-Appellees,

versus

DON SIEGELMAN, in his official capacity
as Governor of the State of Alabama and
President of the State Board of Education,
et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(October 19, 2000)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before TJOFLAT, GODBOLD and HILL, Circuit Judges.
HILL, Circuit Judge:

In 1999, we unanimously vacated the Permanent Injunction entered by the district court in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999)(Chandler I). We also denied plaintiffs-appellees' petition for rehearing. No judge requested a vote on a rehearing en banc, and the mandate issued. Plaintiffs then filed a petition for certiorari with the Supreme Court.

On June 19, 2000, the Supreme Court issued its decision in *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000). On June 26, 2000, the Supreme Court granted the petition for certiorari in *Chandler I* ,[1]vacated our judgment, and remanded the case to us for further consideration in light of *Santa Fe*. The case was returned to us on September 1, 2000.

We have completed our review of *Chandler I* and have concluded that it is not in conflict with the Supreme Court's decision in *Santa Fe*. Accordingly, we will reinstate our opinion and judgment in *Chandler I* . We take this opportunity, however, to explain how *Chandler I* fits within the Supreme Court's analysis in *Santa Fe* so that the district court may have this guidance when it revisits its

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[1] Pursuant to Rule 43(c)(2), Fed. R. Ap p. P., Governor Don Siegelman was automatically substituted as a party for his predecessor in office, former Governor Fob James. The case is now styled *Chandler v. Siegelman*.

injunction.

I.

Santa Fe condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.[2]

In *Santa Fe*, the Supreme Court reaffirmed that the Establishment Clause of the First Amendment prohibits a school district from taking affirmative steps to create a vehicle for prayer to be delivered at a school function. 120 S. Ct. at 2279. This principle has been established for more than thirty years. *Engel v. Vitale*, 370 U.S. 421 (1962). The Court applied that principle to hold that Santa Fe's policy of allowing students to vote on whether to have prayer before football games constitutes such an affirmative step. *Id.* at 2277.

Several facts were critical to this holding. First, the school board adopted the following policy:

> The board has chosen to permit a student to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event . . .

Id. at 2273. Second, the school board instituted its policy by establishing a two-step election process. First, students

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[2] Furthermore, *Santa Fe* is limited to the issue of school-sponsored student speakers over public address systems at official school events. The activities prohibited by the Permanent Injunction entered in *Chandler I* are far more extensive.

vote on whether to have an invocation or message prior to football games. If so, a second election is held to choose a student to do so. *Id.* Only that student may speak at the game, and the same student delivers the message at each game. Id.

In view of these facts, the Court rejected *Santa Fe's* argument that it was merely providing a neutral accommodation of private religious speech. *Id.* at 2277. The Court found significant that the school policy "approve[s] of only one specific kind of message, an `invocation.'" *Id.* Under these circumstances, the Court concluded that "the District has failed to divorce itself from the religious content in the invocations," and has crossed the line from state *neutrality* toward religion to state *sponsorship* of religion.

The fatal flaw in the Santa Fe policy was its attempt to disentangle itself from the religious messages by instituting the student election process. Santa Fe thought it could satisfy the constitutional requirement for neutrality toward religious speech by allowing such speech to be chosen by the majority. In the Court's view, however:

> Santa Fe's student election system ensures that only those messages deemed `appropriate' under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.

Id. at 2276. Such a policy, the Court concluded, substitutes the views of the majority for the government neutrality

required by the Establishment Clause. Thus, it violates the very raison d'être of the Establishment Clause – protection against the tyranny of a religious majority. *Id.* at 2277.

Consequently, the policy is not a *neutral* accommodation of religion. On the contrary, "the realities of the situation plainly reveal that [the District's] policy involves both perceived and actual *endorsement* of religion." *Id.* at 2277. The "`degree of school involvement' makes it clear that the pre-game prayers bear `the imprint of the State.'" *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577 (1992)).

Because the prayers bear the imprint of the State, they cannot be characterized as "private" speech protected by the Free Exercise and Free Speech Clauses. The Court held:

> The delivery of such a message – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -*is not properly characterized as "private" speech.*

Id. at 227 (emphasis added). Since the religious speech produced by Santa Fe's policy is sponsored by and, therefore, attributable to the school, it constitutes an unconstitutional endorsement of religion by the State.

II.

Although the policy at issue in *Santa Fe* involved student-led invocations on school property at school-sponsored, school- related events, the Court was careful to point out that "*not every message delivered under such*

circumstances is the government's own." *Id.* Thus, *Santa Fe* does not obliterate the distinction between State speech and private speech in the school context. It does not reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse. Nor does it hold that all religious speech is inherently coercive at a school event. On the contrary, the prayer condemned there was coercive precisely because it was *not* private. 120 S.Ct. at 2277. The Court's holding in *Santa Fe* is only that State-sponsored, coercive prayer is forbidden by the Constitution.

Furthermore, *Santa Fe* explicitly reaffirms the basic principle that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 120 S.Ct. at 2275 (quoting *Board of Ed. v. Mergens,* 496 U.S. 226, 250 (1990)).[3] *Santa Fe* leaves unanswered, however, under what circumstances religious speech in schools can be considered *private*, and, therefore, protected. This is the answer *Chandler I* sought to supply.

In *Chandler I,* we were asked to review an injunction which assumed that virtually any religious speech in schools is attributable to the State. While the district court recognized that a student must be allowed to pray *silently* while in school, or even discuss his religious

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[3] As we said in *Chandler I*, "[r]eligious speech by students does not become forbidden `state action' the moment the students walk through the schoolhouse door." 180 F.3d 1261-62.

beliefs *quietly* with others, it enjoined the school district from *permitting* any prayer in a *public* context at any school function.[4] We held that this injunction was overbroad to the extent that it equated all student religious speech in any public context at school with State speech. In so doing, it eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors. This the Constitution neither requires nor permits. The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispe rs or banish it to broom closets. If it did, the exercise of one's religion would not be free at all.

It is not the public context that makes some speech the State's. It is the entanglement with the State. What the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer. Remove the school sponsorship, and the prayer is private. In *Chandler I*, we held that such prayer must be permitted.

Therefore, if "[n]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," *Santa Fe,* 120 S.Ct.at 2281, then it does not prohibit prayer aloud or in front of others, as in the case of an audience

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[4] For example, the Permanent Injunction permits students to "quietly engage in religious activity during non-instructional times, so long as it does not unduly call attention thereto." *Chandler I*, 180 F.3d at 1260 n [sic].

assembled for some other purpose. *Chandler I*, 180 F.3d at 2279. So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected:

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's - either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Id. As we said in *Chandler I*, a policy which *tolerates* religion does not improperly *endorse* it. 180 F.3d 1261.

Private speech endorsing religion is constitutionally protected - even in school. Such speech is not the school's speech even though it may occur in the school. Such speech is not unconstitutionally coercive even though it may occur before non- believer students. The injunction entered by the district court in this case proceeded on a contrary assumption and we reaffirm our directive that it must conform its requirements to the Constitution. We directed the district court to revisit its injunction in order to ensure that it did not command the school district to actively prohibit - censor - genuinely student- initiated religious speech, and we do so again.

III.

The Permanent Injunction enjoins the school district from "aiding, abetting, commanding, counseling, inducing,

ordering, or procuring" school organized or officially sanctioned religious activity. The school district recognizes that it may not do these things and does not appeal this portion of the injunction. The injunction also forbids the school district from "permitting" students to speak religiously in any sort of public context. This it cannot constitutionally do. The Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech.[5]

Accordingly, we reaffirm our opinion and reinstate our judgment in *Chandler I*. The case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

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[5] The district court had before it a great deal of information concerning prior actions of school personnel indicating a majoritarian purpose to foster one particular religion. Indeed, it was because of this record that we affirmed the appointment of a monitor. *See Chandler I*, 180 F.3d at 1265. We had no occasion, then or now, to inspect any specific activity of students *permitted* to speak religiously. Nor shall we speculate. Should the permission we now hold to be required be transformed into proselytizing by school personnel, the monitor can bring it to the attention of the court.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

D. C. Docket No. 96-CV-169-N

MICHAEL CHANDLER, individually and as next friend of his son, Jesse Chandler, *et al.*,

Plaintiffs-Appellees,

versus

FOB JAMES, JR., in his official capacity as Governor of the State of Alabama and President of the State Board of Education, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(July 13, 1999)

Before TJOFLAT, Circuit Judge, and GODBOLD and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs brought this action challenging the facial constitutionality of Alabama's statute permitting non-sectarian, non-proselytizing student-initiated prayer, invocations and benedictions during compulsory or non-compulsory school-related assemblies, sporting events, graduation ceremonies and other school-related events. Plaintiffs also challenged the statute as applied by the DeKalb County School Board. The district court held the statute unconstitutional on its face, granted plaintiffs partial summary judgment on their claims regarding the statute as applied, and enjoined defendants from enforcing the statute or continuing to conduct the challenged practices. Defendants bring this appeal.

I.

In 1993, the Alabama Legislature enacted a statute containing the following provision:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995).

In 1996, Michael Chandler, a vice-principal in the DeKalb County school system, and his son Jesse, a student in that system, brought this action challenging the facial validity and the application of this statute in the DeKalb County schools.[1] Defendants included the Governor of the State of Alabama, the State Superintendent of Education, the members of the State Board of Education, and the Superintendents and members of the boards of education of the City of Talladega and of DeKalb County, Alabama.[2]

On March 12, 1997, the district court granted partial summary judgment for the Chandlers, holding the statute facially unconstitutional. On October 29, 1997, the district court permanently enjoined DeKalb County from enforcing the statute. On November 12, 1997, the district court issued findings of fact and conclusions of law in its Supplemental Opinion and Order. That same day, but by separate Memorandum Opinion and Order, the district court held that DeKalb had engaged in unconstitutional officially organized or sponsored religious activities, and granted summary judgment to the Chandlers on their claim that DeKalb had applied the statute unconstitutionally. The district court appointed a monitor to oversee the enforcement of the Permanent Injunction. All defendants

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[1] Also named as plaintiffs are Jane Doe and her daughter Deborah Doe.

[2] The Chandlers subsequently entered into a partial consent decree with the City of Talladega and the district court dismissed the Talladega defendants from the case in 1996.

appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

In his brief, the Governor of the State of Alabama asserts that the district court erred in holding the statute facially unconstitutional under the First Amendment. The Governor contends that the First Amendment's prohibition against the establishment of a religion does not apply to the states by virtue of the Fourteenth Amendment. The district court rejected this argument, as do we. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *See also Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). Because the states are bound by the First Amendment, the district court did not err in evaluating Alabama's statute under it. Accordingly, we shall affirm the judgment of the district court as to the Governor's appeal.[3]

The remainder of the appellants (referred to collectively as DeKalb) do not contest the district court's holding that the statute is facially unconstitutional, nor that the DeKalb County schools engaged in unconstitutional officially organized or sponsored religious activities. Therefore, we do not review the district court's determinations of these issues.

Neither does DeKalb appeal that portion of the Permanent Injunction entered by the district court which prohibits it from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring . . . school

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[3] The Governor does not assert any other error by the district court. We do not decide whether the district court erred in holding the statute facially unconstitutional for any reason not presented to us.

organized or officially sanctioned religious activity in its schools including, but not limited to, vocal prayer, Bible and devotional or scriptural readings, distribution of religious materials, texts, or announcements, and discussions of a devotional or inspirational nature, in school or at school-related events, to include assemblies, sporting events, and graduation ceremonies." Apparently, DeKalb concedes that, under Supreme Court precedent, it may not prescribe prayer or allow state employees to lead, participate in or otherwise endorse prayer of any type during curricular or extracurricular events.[4] *See Lee v. Weisman*, 505 U.S. 577, 586 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

The Permanent Injunction, however, also prohibits DeKalb from "permitting" vocal prayer or other devotional speech in its schools. While the injunction makes clear that it does not prohibit students from voluntarily praying while at school or at school-related events, either individually or with each other, so long as the prayer is purely *private*,[5] it prohibits all prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public

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[4] We do not, therefore, reach any of these issues.

[5] The Permanent Injunction recites that nothing in it should be read to "affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times." Permanent Injunction at 4.

address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony. Furthermore, the prohibition applies to bar not only school personnel from leading or participating in such public or vocal prayer or other devotional speech or Bible reading, but also *requires school officials to forbid students* [6] *or other private individuals from doing so while in school or at school-related events.*

DeKalb does appeal this portion of the Permanent Injunction. It contends that the district court may not constitutionally require it to forbid this speech, pointing out that the Supreme Court has made very clear that "[p]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capital Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).[7] "There is a crucial difference between

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[6] We shall refer to all non-government, private parties collectively as "students."

[7] The Departments of Justice and Education issued a statement of principles in the summer of 1995 "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools." The first paragraph of the statement advises:

> Student prayer and religious discussion: The Establishment clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example,

government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)) (emphasis in original).

Even the Chandlers agree that "[t]he Establishment Clause does not ban prayer. It bans *state* prayer." (Plaintiffs' Reply Brief) (emphasis in original). They contend, however, that student-initiated religious speech in the public schools *is* state prayer, and, therefore, DeKalb may not permit it.

Our review of the Permanent Injunction, then, is limited to the issue of whether the district court may constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools.[8] For the following reasons, we hold the court may not. We vacate the

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> students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable non-disruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

News Release of U.S. Dep't of Educ., Aug. 17, 1995, at 3.

[8] DeKalb also appeals the district court's decision to appoint a monitor to enforce its injunction which we discuss below.

Permanent Injunction and remand for further proceedings.

II.

The district court's opinion holds that the Constitution requires it to prohibit public religious speech in schools because the Establishment Clause is violated if government permits religious speech – even if initiated by students – in schools or at school-related events. DeKalb contends that this conclusion is wrong for two reasons. First, students are not state actors and, therefore, by definition, their actions cannot tend to "establish" religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools.

Students as State Actors and the Establishment Clause

The Establishment Clause prohibits Congress – or any other governmental body – from acting in such a way as to establish a religion. *Everson*, 330 U.S. at 8. DeKalb argues that because students are not state actors – Congress or a governmental body – their religious speech cannot, by definition, tend to establish a religion.

It is true that ordinarily religious speech by private parties cannot establish religion, even if it occurs in a public institution, such as a school. *Mergens*, 496 U.S. at 250. On the other hand, it is clear that private parties' religious speech can violate the Establishment Clause if the State uses such parties as surrogates to accomplish what the State may not do. For example, if a school board may not constitutionally write and require students to recite a prayer, as it most assuredly may not, *Engel v. Vitale*, 370 U.S. 421 (1962), the school board may not avoid this

prohibition by delegating this function to others. *Lee*, 505 U.S. at 577 (invalidating school board policy permitting clergy to give prayers at graduation); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (invalidating school board guidelines which required student or teacher-led prayers in classrooms). Nor may the State establish a policy which "permits" private parties to speak, but then limits their speech to prayer or other devotional speech. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996) (authorizing *invocations, benedictions and prayers*); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (school board policy permitted students to vote to have *prayer* at graduation); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1155 (1995) (school policy permitted student to lead *prayer*); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (authorizing student-led *invocations* and *only* invocations at school sporting events); *Hall v. Board of Sch. Comm'rs*, 656 F.2d 999 (5th Cir. 1981) (school policy permitted *devotionals*, and only devotionals); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 760-61 (9th Cir. 1981) (authorizing *invocations, benedictions*, and *prayers* only).

When the State *commands* religious speech, it steps over the Constitution to establish religion. In each of these cases, it is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause; *not* the private parties' religious speech. It is not the "permitting" of religious speech which dooms these policies, but rather the *requirement* that the speech be religious, i.e., invocations, benedictions, or prayers.

This was the holding of the original school prayer case, *Engel v. Vitale*, in which the Court observed:

> The Petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country *it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.*

370 U.S. at 425 (emphasis supplied). The Court held, therefore, that "government in this country, be it state or federal, is without power to *prescribe by law any particular form of prayer which is to be used as an official prayer* in carrying on any program of governmentally sponsored religious activity." *Id.* (emphasis supplied). This is all it held.

Some lower courts have extended *Engel* to require

government to prohibit *any* public expression of religious belief in schools. Support for this holding is said to be located in the Court's observation that the denominational neutrality of the prayer did not "free it from the limitations of the Establishment Clause." *Id.* at 430. These courts interpreted this to mean that *no* religious speech could be tolerated in the public schools because the Establishment Clause forbade it.

This is not what the Court said, however. The denominational neutrality of the Regent's prayer could not "free it from the limitations of the Establishment Clause" because the prayer was "commanded" by the State. It really did not matter what the prayer said; *no* prayer commanded by the State can survive scrutiny under the Establishment Clause.

The Court specifically cautioned that "nothing could be more wrong" than to interpret *Engel* to require "a hostility toward religion *or toward prayer.*" *Id.* at 434 (emphasis supplied). On the contrary, "[t]he history of man is inseparable from the history of religion." The First Amendment, "which tried to put an end to governmental control of religion and of prayer, was not written to destroy either." *Id.* at 435. Rather, it protects freedom of religious expression by forbidding *government* from requiring us to "speak only the religious thoughts that government want[s] [us] to speak and to pray only to the God that government want[s] [us] to pray to." *Id.* The Court summarized its holding in *Engel* in the following way:

> It is neither sacrilegious nor antireligious to say that each separate *government in this country should stay out of the business of*

> *writing or sanctioning official prayers* and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Id. (emphasis supplied). Thus, *Engel* merely made clear that the Establishment Clause prohibits the government from commanding prayer and prescribing its form.[9]

But DeKalb does not claim otherwise. DeKalb contends only that nothing in the First Amendment, nor in any of the Supreme Court's interpretations of it, requires it to prohibit the religious speech of private parties – such as students – if that speech is genuinely privately-initiated, i.e., not commanded by a school board or state law. On the contrary, DeKalb argues, the First Amendment positively *requires* that it tolerate students' religious speech to the same extent that it permits students' secular speech.

The Chandlers, on the other hand, contend that when the State permits students to speak religiously in situations that are not purely private,[10] the State lends its imprimatur to the speech, thereby endorsing and advancing religion in violation of the "obligation of the public schools to provide a religiously neutral environment." They also argue that all public religious speech in schools is

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[9] The opt-out provision of the school board's policy was constitutionally insignificant in the context of "governmentally composed prayers for religious services" in schools. 370 U.S. at 425.

[10] The Permanent Injunction, for example, permits students to "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto."

unconstitutionally coercive of some students because of "peer pressure." Consequently, schools must forbid all public religious speech in school, including genuinely student-initiated religious speech.

Student Speech and the Free Exercise and Free Speech Clauses

This, then, is the question DeKalb asks us to answer. Do school officials have "the ability (and duty) to impose content restrictions on purportedly 'private' speakers at school events," in order to achieve neutrality with respect to religion as the Chandlers contend (Chandlers' Brief at 27); or do the Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech, as DeKalb contends? Under the Chandlers' theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious.

We disagree. The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

It is true that government must be neutral with respect to religion. But it is equally true, as Justice Goldberg warned, that an:

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that

> noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring).

The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion because the:

> exclusion of religious ideas, symbols, and voices marginalizes religion . . . . Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 189 (Winter 1992).

The prohibition of all religious speech in our public schools implies, therefore, an unconstitutional *disapproval* of religion. If endorsement is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). "What is crucial is that a government practice

not have the effect of communicating a message of government endorsement *or* disapproval of religion." *Id.* at 692 (emphasis supplied). "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief – atheism – as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.[11]

Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's – either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution. *See Mergens*, 496 U.S. at 250; *Jones v.*

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[11] We believe that the First Amendment's requirement that government "tolerate" diverse political views, including those that are totally antithetical to our constitutionally guaranteed republican form of government, applies to require that government "tolerate" atheistic views without also requiring that we eschew religion. Tolerance of disbelief does not require that we deny our religious heritage, nor elevate atheism over that heritage. The First Amendment requires only that the State tolerate both, while establishing neither. Americans, however, are free to prefer one or the other and to express that preference wherever they are permitted to speak. This means, of course, that a student may choose to express his atheistic views as well as his religious ones.

Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). "Students do not shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Religious speech by students does not become forbidden "state action" the moment the students walk through the schoolhouse door.

Furthermore, the Supreme Court has made clear that permitting religious speech or symbols in our public institutions does not automatically constitute an unconstitutional State endorsement of religion. In fact,"[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1983). References to our religious heritage are found in the statutorily prescribed national motto on our currency, "In God We Trust," 36 U.S.C. § 186, and in the language "one nation under God," which is part of the Pledge of Allegiance to our flag – recited by public school children every day. Congress opens with a prayer, and, indeed, the Supreme Court, itself, hears oral argument in a chamber decorated with a depiction of Moses and the Ten Commandments. We celebrate Thanksgiving and Christmas as national holidays, and Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h.

The Constitution does not require a complete separation of church and state such that religious

expression may not be tolerated in our public institutions.[12] In fact, "it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (emphasis supplied). The Supreme Court has made clear that "[a]nything less would require the 'callous indifference' we have said was never intended by the Establishment Clause," and "would bring us into 'war with our national traditions as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (quoting *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948)).

The examples cited above all "evidence [our] accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation . . . governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people.'" *Lynch*, 465 U.S. at 677-78 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). Genuinely

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[12] In fact, the Constitution probably does not require a "wall" at all. The phrase comes from a letter written by Jefferson who was neither present when the First Amendment was passed, nor consulted about its language. In a short note to the Danbury Baptist Association written fourteen years after the Bill of Rights was passed, he made a passing reference to idea that the First Amendment "build[s] a wall of separation between church and State." *See Wallace v. Jaffree*, 472 U.S. 38, 92 (Rehnquist, J., dissenting). In any event, the "wall" concept has been acknowledged by the Court itself, with what Justice Rehnquist characterized as "embarrassing candor," as merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Id.* at 107 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

student-initiated religious speech can also be accommodated without resulting in an unconstitutional State endorsement of religion.

Furthermore, even if permitting student-initiated religious speech advances religion in some sense, this does not mean the speech violates the Establishment Clause. Even *State* action may incidentally advance religion without offending the Constitution. *Widmar v. Vincent*, 254 U.S. 263 (1981). The Supreme Court has recognized that "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 465 U.S. at 683. "Not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Id.* (quoting *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)). Student-initiated religious speech, therefore, even if it incidentally advances religion, does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects. *See Clear Creek*, 977 F.2d at 965.

Finally, the fact that student religious speech may fall on deaf ears does not make it unconstitutionally coercive. *Lee*, 505 U.S. at 577. In *Lee*, the Supreme Court was careful to point out that:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We

> know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

505 U.S. at 597.[13] Those who do not espouse a speaker's religious beliefs are free not to listen, and to express their disagreement by not participating in any way.

Accommodation of religious beliefs we do not share is, however, a part of everyday life in this country:

> In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

Lee, 505 U.S. at 628 (Souter, J. concurring). Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty.[14] This is a price we freely pay. It is not

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[13] Of course, in this case we do not have state action. Private religious speech has even less potential for coercion.

[14] Justice Scalia observed in *Lee* that "We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . . I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate – so that even if it were the case that the displaying of such respect might be mistaken for taking part in the prayer, I would deny that the dissenter's interest in avoiding even the false appearance of participation constitutionally trumps the government's interest in

coerced.[15] Only when the speech is commanded by the State does it unconstitutionally coerce the listener.[16]

Ultimately, the issue in this case is not whether school officials may prescribe prayer or enlist surrogates to that end. They may not. Nor is the issue whether school officials may prohibit religious speech in schools, or censor the content of that speech. They may not. The real issue is what sort of time, place, and manner limits may be imposed upon genuinely student-initiated religious speech in schools? When may students pray? Where may they pray? Under what circumstances may they pray?

In answering these questions, we must fulfill the constitutional requirement of *permitting* students freely to express their religious beliefs without allowing the machinery of government – the school – to be used to

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fostering respect for religion generally." 505 U.S. at 637-38 (Scalia, J. dissenting).

[15] Justice Souter acknowledged this in *Lee*: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. But that is not our case." 505 U.S. at 630 n. 8.

[16] The "indirect coercion" identified in *Lee* by the plurality opinion was exerted over the audience by the *State*'s command that there be religious speech at graduation. 505 U.S. at 592-93. Justice Kennedy's concern that "*in the hands of government* what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," *id.* at 591-92 (emphasis supplied), does not apply to the case of student-initiated religious speech.

command prayer. This requires that we resolve the tension between the right to pray and the right to be free from government-mandated prayer. This is not an easy task. It would be easy simply to banish prayer from our public institutions, but this would be not only constitutionally incorrect, but also fundamentally unfair to our society.

III.

How, then, does a school accommodate religious expression without commanding it? DeKalb argues that the answer is simple – it is to be "permitted." Not required. Not commanded. Not even suggested. Simply, permitted. If students, or other private parties, wish to speak religiously while in school or at school-related events, they may exercise their First Amendment right to do so.

The first principle must always be that genuinely student-initiated religious speech must be *permitted.* A student's individual decision to pray or otherwise speak religiously is not the State's command. *Clear Creek*, 977 F. 2d at 965.[17] Such speech is fully protected. *Id. See also Mergens*, 496 U.S. at 252.

On the other hand, even genuinely student-initiated religious speech may constitute state action if the State

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[17] The Ninth Circuit also upheld a policy that permitted the top four students to speak on any topic of their choosing without state approval in *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), but the court en banc ordered the district court to dismiss the complaint for lack of standing and mootness. No. 97-35642 (9th Cir. May 19, 1999).

participates in or supervises the speech. *See Duncanville*, 70 F.3d at 406-07.[18] Religious speech in school by teachers, for example, is especially troublesome because "a teacher's [religious] speech can be taken as directly and deliberately representative of the school." *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991). Teacher participation in student-initiated prayer "improperly entangles the State in religion and signals an unconstitutional endorsement of religion." *Duncanville*, 70 F.3d at 406. In upholding the Equal Access Act, which provides that schools must afford religious groups the same access to school facilities as secular groups enjoy, the Supreme Court relied in part on the act's express

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[18] While many subsequent courts have cited *Duncanville* for the proposition that student-initiated speech at school-related sporting events is *un*constitutional, the Fifth Circuit specifically held that, "[s]tudents *may voluntarily pray together*, provided such prayer is not done with school participation or supervision." 70 F.3d at 405 (emphasis supplied). Judge Jones, in her separate concurrence and dissent, pointed out that:

> This decision . . . does not prevent students from exercising their constitutional rights of free speech, association and free exercise by praying at appropriate times and in an appropriate manner during athletic practices or games. Further, we must abide by the Supreme Court's decisions . . . that prevent active school leadership, encouragement or promotion of the prayers. The only questions here are how teachers may respond to student-initiated prayers and to what extent the school may "supervise" the prayers.

70 F.3d at 409.

prohibition on teacher participation which "avoids the problems of the 'students' emulation of teachers as role models.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards*, 482 U.S. at 584). Therefore, student religious speech must be without oversight, without supervision,[19] subject only to the same reasonable time, place, and manner restrictions as all other student speech in school.

Because religious speech is protected speech, government may not censor its content. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Cornelius v. NAACP Legal Defense &*

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[19] What constitutes "supervision?" As Judge Jones wrote in *Duncanville*:

> At a broad level, everything that goes on during practice or competition, including student-initiated locker-room or basketball court prayer, is subject to the coaches' "supervision." To outlaw supervision on this level would be to outlaw the otherwise constitutional student-led prayers. . . . It must be, then, that the injunction pertains only to active supervision and is thus redundant of the cautions that the school may not promote, encourage or lead prayers.

70 F.3d 410.

Supervision cannot mean, therefore, mere presence. Support for this view is found in *Mergens* in which the Supreme Court found no constitutional infirmity with the provision of the EAA which permits school employees to be present for custodial purposes at religious meetings held on school property. 496 U.S. at 236. We agree with Judge Jones that, for supervision to amount to unconstitutional endorsement, it must cross the line into active endorsement, encouragement or participation.

Educ. Fund, Inc., 473 U.S. 788, 806 (1985)) (the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses). Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995). Government may not, therefore, censor religion from the content of students' protected speech at school. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are *viewpoint neutral*.") (emphasis supplied); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (A "state may reserve the [nonpublic] forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.")

A student's right to speak religiously is not, however, without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech. Furthermore, a student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience. *See Abington*, 374 U.S. at 228. The Constitution requires that schools permit religious expression, not religious proselytizing. "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the

Establishment Clause." *Lee*, 505 U.S. at 587. Proselytizing speech is inherently coercive and, the Constitution prohibits it from the government's pulpit. *Id.*

IV.

The Permanent Injunction enjoins DeKalb from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring" school organized or officially sanctioned religious activity. DeKalb does not appeal this prohibition. The record in this case reveals, however, that there were many sincere, but unconstitutional efforts by school personnel to do just what the injunction prohibits – to endorse, encourage, or participate in student religious activity. For this reason, the appointment of a monitor by the district court was not an abuse of discretion. *See Local 28 of the Sheet Metal Workers' Int'l v. EEOC,* 478 U.S. 421, 481-82 (1986). The monitor's task is to be vigilant in guarding against the repetition of this unconstitutional activity by the schools.

The Permanent Injunction also forbids DeKalb from "permitting" students to speak religiously. This it cannot constitutionally do. So long as school personnel do not participate in or actively supervise student-initiated speech, DeKalb cannot constitutionally prohibit students from speaking religiously and the Permanent Injunction cannot require it to.

We do not undertake to re-write the Permanent Injunction. The district court is in the best position to do that. We note only that the Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and

manner of that speech which exceed those placed on students' secular speech.[20]

Accordingly, the Judgment of the district court is AFFIRMED as to the Governor's appeal. As to the remaining defendants' appeals, the Permanent Injunction is VACATED and the case is REMANDED for further proceedings not inconsistent with this opinion.

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[20] This includes restrictions on announcements permitted in the schools' commencement programs, and the distribution of religious literature.

TJOFLAT, Circuit Judge, specially concurring:

I agree wholeheartedly with the majority's analysis in this case. I write separately, however, to emphasize a more fundamental error made by the district court. I believe that many provisions of the injunction entered by the district court were entered in violation of basic principles of equity jurisprudence and constitutional law – namely, the principle that equity will not intervene where there is an adequate remedy at law and the constitutional principle of separation of powers. These principles, for reasons that will be explained hereafter, lead to the conclusion that a court should not enter an injunction that cannot be enforced through coercive contempt sanctions. Some of the injunctive provisions at issue here cannot be so enforced, and therefore must be vacated.[1]

In part I of this concurrence, after recognizing that injunctions are enforced through contempt sanctions, I discuss the types of contempt sanctions generally available to a judge. I then explain that the types of contempt sanctions available to address a violation of a particular injunction depend on the nature of the injunction; not all types of sanctions are available for all injunctions. Finally, I explain why, based on equitable and constitutional considerations, an injunction should be entered as a form

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[1] The issues I discuss herein were properly not relied upon by the majority opinion for the simple reason that they were not raised by the appellants either in the district court or on appeal. They are, however, sufficiently important to our system of jurisprudence that I feel it is appropriate – indeed necessary – to address them sua sponte in this concurrence.

of relief for a party to a lawsuit only when one type of contempt sanction – coercive – is potentially available for violations. Part II then applies this rule to the facts of this case.

I.

Injunctions are enforced through contempt sanctions. See 18 U.S.C. § 401(3) (1994). When it comes to a judge's attention that an individual may not be in compliance with an injunction he has entered, he holds a "show cause" hearing at which the allegedly noncomplying individual is asked to show cause why he is disobeying the injunction. If the individual is in fact disobeying the injunction, and he is unable to provide an acceptable excuse for doing so, then he is subject to the contempt powers of the court.[2] In this part, I discuss the types of contempt sanctions available to a court, and then discuss how this should impact the court's decision whether to grant injunctive relief in the first instance.

A.

Contempt sanctions take one of three forms: punitive, compensatory, or coercive. Punitive sanctions punish the contemnor for his conduct, and are imposed for the purpose of vindicating the authority of the court. See Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441,

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[2] This procedure is laid out in more detail in Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996).

31 S. Ct. 492, 498, 55 L. Ed. 797 (1911).[3] For instance, if an individual is served with a subpoena duces tecum but refuses to produce the requested documents, and the court subsequently holds him in contempt and imposes a flat fine of $50 (payable to the court) for his contempt, the contempt sanction is properly classified as punitive. See Penfield Co. of Cal. v. SEC, 330 U.S. 585, 592-93, 67 S. Ct. 918, 922, 91 L. Ed. 1117 (1947). In such a situation, the opposing party is provided no relief, because it gets neither the requested documents nor the proceeds from the fine. Furthermore, the contemnor has no way to purge the contempt (in other words, avoid the fine); if he produced the requested documents five minutes after the court's decision, he would still be required to pay $50. The sanction in such a case is intended to punish the contemnor for his contempt, thereby vindicating the court's authority and thus deterring the contemnor and others from violating subsequent judicial orders (issued by the same or any other court). Punitive sanctions are criminal in nature and therefore many of the constitutional protections available in criminal proceedings – including the presumption of innocence, the privilege against self-incrimination, the right to counsel, and the right to a jury trial in serious cases – must be provided to the alleged contemnor before such sanctions can be imposed. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99,107 S. Ct.

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[3] The principles set forth in Gompers have been recently reaffirmed in International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-29, 114 S .Ct. 2552, 2556-58, 129 L. Ed. 2d 642 (1994).

2124, 2133, 95 L. Ed. 2d 740 (1987).[4]

The second form of contempt sanction is compensatory. Compensatory sanctions are civil in nature and compensate the plaintiff for the damage caused by the contemnor's contempt. See United States v. United Mine Workers of Am., 330 U.S. 258, 303-04, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947). The contempt sanction in the well-known case of Jones v. Clinton, 36 F. Supp. 2d 1118 (E.D. Ark. 1999), falls into this category. In that case, the court, having found that the defendant gave false deposition testimony, held the defendant in contempt. The punishment for the contempt was a payment to the plaintiff of the expenses (including attorney's fees) caused by the false testimony. See id. at 1134-35. Compensatory sanctions, unlike punitive sanctions, provide a direct benefit to the plaintiff. Like punitive sanctions, however, the contemnor is unable to purge his contempt: Were President Clinton now to amend his deposition answers to make them completely accurate, the contempt sanctions would nevertheless remain in force.

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[4] As stated in Young:

> [D]efendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.

Young, 481 U.S. at 798-99, 107 S .Ct. at 2133 (citations omitted).

The third form of contempt sanction is coercive. Coercive sanctions are also civil in nature, and are intended to coerce the contemnor into doing an act that he is already required to do, but refuses to perform. See Gompers, 221 U.S. at 441-42, 31 S. Ct. at 498. Thus, to use the previously cited example from Penfield, if the district court had ordered the recipient of the subpoena duces tecum to pay a fine of $50 per day for every day the recipient failed to produce the requested documents, such a sanction would be coercive.[5] Coercive sanctions benefit the plaintiff by pressuring the defendant into performing an action that the plaintiff desires to have performed. See id. at 442, 31 S. Ct. at 498. They also give the contemnor the opportunity to purge his contempt: The punishment continues only as long as the contemnor refuses to comply with the relevant court order. Hence, in regard to coercive sanctions, it is often said that a contemnor carries the key to his prison in his own pocket. See, e.g., Blalock v. United States, 844 F.2d 1546, 1559 (11th Cir. 1988) (Tjoflat, J., specially concurring) (quoting In re Nevitt, 117 F. 448, 461 (8th Cir. 1902)).

The lines separating each type of sanction from the others are not always clear. Consider a situation in which a court imposes a $150 contempt sanction on a party, payable to the adverse party but in no way correlated to the

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[5] The fine would presumably be paid to the court, although in theory it could be paid to the opposing party. Regardless of who received the money, because the clear purpose of the fine would be to pressure the contemnor into compliance, the fine would be classified as coercive.

harm suffered by that party. The fact that the sanction is payable to the adverse party (and not the court) makes the sanction appear compensatory, but the fact that the amount of the sanction is unrelated to the harm suffered by the adverse party leads to the conclusion that the sanction is in fact punitive. Cf. Thyssen, Inc. v. S/S Chuen On, 693 F.2d 1171, 1173-74 (5th Cir. 1982). Furthermore, every contempt sanction serves to some degree to vindicate the authority of the court (and thus is somewhat punitive) and to dissuade the contemnor from repeating his misbehavior (and thus is somewhat coercive). See Gompers, 221 U.S. at 443, 31 S. Ct. at 498. One might argue that this fact renders meaningless the distinctions among the types of contempt sanctions – for instance, because all contempt sanctions are somewhat punitive, it makes no sense to distinguish punitive contempt sanctions from the other two types of contempt sanctions. This, however, is the equivalent of arguing that because all men have facial hair, it makes no sense to distinguish between bearded and non-bearded men. In both cases, the question is one of degree, and the fact that there will be difficult cases at the margins does not deprive the conceptual categories of their significance. Instead, difficult cases merely require a detailed "examination of the character of" the sanction being imposed in order to determine whether it is punitive, compensatory, or coercive. Hicks v. Feiock, 485 U.S. 624, 636, 108 S. Ct. 1423, 1432, 99 L. Ed. 2d 721 (1988).

B.

The types of sanctions – punitive, compensatory, or coercive – that can be used to enforce an injunction depend

on the character of the conduct being enjoined. Consider first an injunction that commands the performance of a specific act. For instance, imagine a case in which the defendant operates a paper mill that is discharging pollutants onto the plaintiff's land. The plaintiff brings a lawsuit alleging a nuisance, and seeks an injunction ordering the defendant to shut down the mill. The plaintiff succeeds and the injunction is granted. The defendant, however, continues to operate the paper mill. The court, after conducting a show cause hearing and finding the defendant in contempt, could use any of the types of sanction previously discussed: a punitive sanction (such as a flat fine of $10,000), a compensatory sanction (such as a fine of $5,000, which is roughly equal to the harm caused, payable to the plaintiff), or a coercive sanction (such as a fine of $100 per day until the paper mill is shut down).

Next, consider an injunction that forbids the performance of a specific act. For instance, imagine a case in which an employee alleges that her corporate employer, through the actions of its CEO (who is also the majority shareholder), has, on a number of occasions, touched her in inappropriate areas. The employee claims that this behavior constitutes sexual harassment, in violation of 42 U.S.C. § 2000e-2(a)(1) (1994).[6] She files a lawsuit against her employer, seeking an injunction ordering the employer

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[6] The employee's claim would be that the CEO had created an "abusive work environment," as opposed to a claim of quid pro quo sexual harassment. See generally Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (discussing "abusive work environment" claims).

to cease the harassment.[7] She succeeds, and the injunction is granted. Nevertheless, the CEO continues the inappropriate touching. The court, after conducting a show cause hearing and finding the employer in contempt, can assess punitive sanctions (such as a flat fine of $10,000, payable to the court) or compensatory sanctions (such as a fine equal to the harm caused, payable to the employee). Coercive sanctions, however, are not available, because the act to be prevented by the injunction has already occurred – in other words, there is no way to purge the contempt.[8] See Gompers, 221 U.S. at 442, 31 S. Ct. at 498 ("[I]f the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. [Contempt

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[7] Injunctions of this sort actually amount to nothing more than injunctions to "obey the law," which, for reasons different from those outlined here, have repeatedly been held invalid. See, e.g., Payne v. Travenol Labs., Inc., 565 F.2d 895, 897-98 (5th Cir. 1978) (holding that injunctions to "obey the law" violate the requirements of Fed. R. Civ. P. 65(d) that an injunction "be specific" and "describe in reasonable detail . . . the act or acts sought to be restrained"). (In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.)

[8] The situation might be different depending on the nature of the harassment. For instance, if the harassment consisted in part of the placement of pornographic pictures throughout the office, the employee could seek an injunction ordering that the pictures be removed. If the injunction was granted, it could be enforced through coercive sanctions – for instance, a fine of $200 per day until the pictures were removed.

sanctions] cannot undo or remedy what has been done . . . .").

To make the point clearer, try to imagine a court attempting to enter coercive sanctions in the situation outlined above. The court has enjoined the employer not to harass the employee. The employer nevertheless does so, and, after a show cause hearing, is held in contempt. The court fines the employer $100 per day until . . . well, until what? Presumably, until the court is persuaded that the harassing CEO will not repeat his misbehavior. Thus, after three days of fines, the CEO contacts the judge and promises that he will never again sexually harass the employee. The court thinks the CEO was shifting his eyes a bit much when he made the promise, however, and therefore allows the fines to continue accumulating. After a week of fines, the CEO makes the same promise, but this time on his knees and with his hands clearly visible so that the court can see that the CEO's fingers are not crossed. The court is still unpersuaded, and continues allowing the fines to accrue. This exercise would presumably continue until such time as the court, for whatever reason, decided that the CEO had learned his lesson.[9] Even then, the contempt would not have been purged, because the harassment would already have been fully accomplished. The point is simply that when an injunction forbids the performance of an act, coercive sanctions are not available

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[9] In contrast, where the contemnor is enjoined to perform a specific act, promises of future compliance are neither necessary nor relevant – the contemnor can avoid sanctions by (and only by) performing the commanded act.

to enforce the injunction.

Note that it is not the affirmative or negative phrasing of the injunction that is critical. An injunction commanding the performance of specific act (for instance, "shut down the paper mill") could, in many cases, just as easily be phrased as an injunction prohibiting a ongoing harm (for instance, "do not operate the paper mill"). Likewise, an injunction forbidding the performance of a specific act (for instance, "do not sexually harass the employee") could, in many cases, be phrased as an injunction commanding the performance of an ongoing duty (for instance, "treat male and female employees equally"). Cf. International Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 835, 114 S. Ct. 2552, 2561, 129 L. Ed. 2d 642 (1994) (suggesting that an injunction directed at a union stating, "Do not strike," is essentially the same as one stating, "Continue working"). Rather, it is the underlying nature of the injunction – specifically, whether it is commanding an act that the law requires or proscribing an act that the law forbids – that determines whether it can be enforced through coercive sanctions.

In sum, if an injunction commands the performance of a specific act (such as shutting down a paper mill), then all three types of sanctions are available to the court. If, however, an injunction forbids the performance of an act (such as sexually harassing an employee), then only punitive and compensatory sanctions are available to the court.

C.

The types of contempt sanctions available for violation of an injunction determine the effectiveness of the injunctive relief being given to the plaintiff. Specifically, as I discuss in this section, injunctions that are enforceable only through punitive and compensatory sanctions provide relief to a plaintiff that is – at best – duplicative of the relief available through an action for damages.[10] Only injunctions enforceable through coercive sanctions provide a form of relief that is unique to equity. They are therefore the only type of injunctions that courts should enter, on the basis of the rule that injunctions should not be granted where the plaintiff has an adequate remedy at law. See Weaver v. Florida Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999).

Punitive sanctions provide essentially no relief to the plaintiff – as discussed above, the purpose of punitive sanctions is to vindicate the court's authority, not to benefit a party to a lawsuit. Any benefit to the plaintiff from such a sanction is incidental and indirect. For instance, in the sexual harassment hypothetical in part I.B, supra, assume that the court chose to impose a punitive sanction – such as a fine of $10,000 against the employer, payable to the court. This fine would do nothing to affect the harassment that had already occurred; at this point, the harassment is a "done deal" and the court cannot undo it. In addition, the fine would do nothing to compensate the plaintiff for the harm caused by the harassment. The only benefit provided

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[10] This is not to say that punitive and compensatory sanctions should never be used to enforce injunctions. Some examples of their proper use will be discussed in part I.E, infra.

to the plaintiff from the fine would be a deterrent: Because of the imposition of the fine, the employer might be less inclined to harass the plaintiff in the future. This deterrent, however, is equally available to the plaintiff through an action for damages: If, instead of seeking an injunction and then calling for a show cause hearing at which the employer was assessed punitive sanctions, the plaintiff had simply brought a damages action after the harassment occurred, the employer would be equally deterred. (Furthermore, the plaintiff would receive compensation for the harm caused, unlike in the injunction scenario.) In sum, every benefit that the plaintiff gets from an injunction enforced by punitive sanctions would be equally available in an action for damages.

Compensatory sanctions merely imitate the relief that would be provided in a damages action. For instance, returning to the sexual harassment example, assume that the court chose to impose a compensatory sanction on the employer. The court, after hearing argument from both parties, determined that the damage to the plaintiff from the harassment was roughly $5,000, and ordered the employer to pay that amount to the plaintiff. The fine does not affect the prior harassment (it is again a "done deal"), but compensates the plaintiff for the harm she has suffered. In this situation, the relief provided to the plaintiff imitates that which would be provided in a damages action – in terms of both compensation to the plaintiff and as a future deterrent to the employer. Again, as with punitive sanctions, every benefit that the plaintiff gets from an injunction enforced by compensatory sanctions would be equally available from an action for damages.

Coercive sanctions, in contrast, provide meaningful and unique relief to the plaintiff. For instance, using the paper mill hypothetical from part I.B, supra, assume that the court chose to impose a fine of $100 per day on the defendant until he shut down the paper mill. The defendant is now subject to an ever-increasing pressure to take the action that the plaintiff seeks – a pressure that would not be available through an ordinary damages action. There is of course still no guarantee that the defendant will shut down the mill, but, because of the injunction, the plaintiff is able to exert greater pressure on the defendant to do so than would be possible in the absence of the injunction.

These observations lead to the conclusion that where an injunction is enforceable only through punitive or compensatory contempt sanctions,[11] and not through coercive contempt sanctions, the injunctive remedy being given to the plaintiff is no better than the remedy he could have obtained in an after-the-fact action for damages. Therefore, the plaintiff necessarily has an adequate remedy at law – or at least a remedy at law that is no less adequate than the injunctive remedy.[12] Consequently, the principle

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[11] As discussed in part I.B, supra, injunctions are enforceable only through punitive or compensatory contempt sanctions when they forbid the performance of an act (or command the performance of an ongoing duty).

[12] An injunction enforceable only through punitive or compensatory sanctions does give a plaintiff one benefit that a damages action cannot provide: an ex ante declaration of the rights of the parties. For instance, consider a case in which the defendant is preparing to

that an injunction will not be entered where the plaintiff has an adequate remedy at law forbids the entering of an injunction under such circumstances.

D.

In addition to violating equitable principles, an injunction that is enforceable only through punitive or compensatory sanctions may also violate the Constitution. Specifically, such an injunction has the potential to run afoul of the constitutional doctrine of separation of powers.

An injunction forbidding the performance of a particular act must be based on a conclusion that the act forbidden, if performed, would constitute a violation of the law. Otherwise, the court would be enjoining the performance of a perfectly legal act, which the court is

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remove some trees from a plot of land. The plaintiff, asserting that the land is his, seeks an injunction (based on the law of trespass) forbidding the defendant from removing the trees. The plaintiff succeeds and the injunction is issued. The defendant, having previously believed that the land was his, may now be persuaded to change his behavior. Thus, although the injunction would not be enforceable through coercive contempt sanctions (because it forbids the performance of an act), it would nevertheless have provided the plaintiff with meaningful relief in the form of an ex ante declaration of rights. If, however, this is the only form of relief being provided to the plaintiff, then the appropriate remedial vehicle is a declaratory judgment, not an injunction. See 28 U.S.C. § 2201 (1994).

The distinction is not merely a formal one: Injunctions, unlike declaratory judgments, implicate the court's contempt powers and thus subject the enjoined party to sanctions should he disobey. Declaratory judgments therefore do not raise the same separation-of-powers concerns as injunctions, as discussed in part I.D, infra.

without authority to do.

If the law on which the injunction is based is legislatively created, then the legislature is likely also to have created rules regarding the means by which the law should be enforced and the appropriate sanction for a violation of the law. For instance, the harassing behavior of the hypothetical CEO in part I.B, supra, is illegal as a result of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994). The procedure for enforcing Title VII is set forth in 42 U.S.C. § 2000e-5 (1994). Under that section, an employee alleging a Title VII violation must first file a charge with the Equal Employment Opportunity Commission ("EEOC"). If the EEOC decides not to bring a civil action against the employer, it must notify the aggrieved employee, who then has ninety days in which to bring a civil action on her own. See 42 U.S.C. § 2000e-5(f)(1). If the action is successful, the types of relief available to the employee are set forth in 42 U.S.C. § 2000e-5(g).[13]

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[13] Section 2000e-5(g) specifically authorizes injunctive relief for violations of Title VII. This provision could conceivably be read as congressional authorization of injunctive relief regardless of whether the plaintiff has an adequate remedy at law. The more reasonable reading of the provision is that it means merely that injunctive relief is allowed when the traditional equitable requirements are met – including the absence of an adequate remedy at law. See Sanchez v. Philip Morris Inc., 774 F. Supp. 626, 630-31 (W.D. Okla. 1991) (denying an injunction in a Title VII case on the ground that the plaintiff's legal remedies are adequate); cf. Hecht Co. v. Bowles, 321 U.S. 321, 329-30, 64 S. Ct. 587, 591-92, 88 L. Ed. 754 (1944) (holding, in regard to a similar provision in the Emergency Price

Once the employee obtains an injunction that orders the employer to cease the harassment, however, she can completely circumvent the procedure prescribed by Congress. No notice to the EEOC is necessary; the employee need only request a show cause hearing from the court. If the employer is held in contempt, the court can respond with compensatory or punitive sanctions. See supra part I.B. If the court imposes compensatory sanctions, the limitations on relief found in 42 U.S.C. § 2000e-5(g) will be inapplicable. Furthermore, the employer will have no means of raising many of the defenses that would be available in an ordinary civil action, such as laches. If the court imposes punitive sanctions, it will have effectively made criminal conduct that Congress has not deemed criminal (in light of the absence of statutory criminal punishments for violations of Title VII). Even if Congress had done so, the enforcement of the criminal law would be a matter for the executive branch, not the judicial branch.[14] Thus, regardless of whether the injunction is enforced through compensatory or punitive sanctions, the court has intruded on the

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Control Act, that the traditional rules of equity still apply to the granting of injunctions). Even if I am mistaken in this view, however, this means merely that Title VII is an exception to the general rule (much like securities law, see infra note 18) and takes nothing away from the broader point being made in the text.

[14] This is one of the reasons for the equitable principle that equity will not enjoin the commission of a crime. See 11A Charles Alan Wright et al., Federal Practice and Procedure § 2942, at 70-71 (2d ed. 1995).

province of the legislative and executive branches by altering the congressionally-created procedures and remedies for sexual harassment.[15]

In sum, an injunction enforceable only through punitive or compensatory sanctions constitutes an individualized criminal or civil law (respectively). This new law is duplicative of the existing law but with a different enforcement mechanism – contempt proceedings – and thus creates an opportunity to use different procedures and to impose different sanctions from those contemplated by the legislature under the circumstances. Therefore, where the action being enjoined is a violation of statutory law, the entry of an injunction implicates the constitutional doctrine of separation of powers. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9, 110 S. Ct. 2510, 2517 n.9, 110 L. Ed. 2d 455 (1990) (noting that separation of powers requires "that Congress rather than the courts controls the availability of remedies for violations of statutes"); cf. NLRB v. Express Pub. Co., 312 U.S. 426, 435, 61 S. Ct. 693, 699, 85 L. Ed. 930 (1941) (noting that, except where a specific violation has been found, "Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act").

E.

In light of all I have just said, a few caveats are in

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[15] The court could avoid this problem only by conducting a contempt proceeding that, in every relevant way, duplicated a criminal or civil trial.

order. First, I am not saying that punitive and compensatory contempt sanctions are never appropriate means for enforcing an injunction. For instance, if a party is enjoined to produce certain documents and then destroys those documents, coercive sanctions would no longer be available. Under those circumstances, a punitive contempt sanction would be an important means of vindicating the court's authority. The injunction nevertheless would have been appropriately entered, because coercive sanctions were a viable option at the time the injunction was entered and thus the injunction provided meaningful relief to the adverse party.

Second, a court may enter an injunction that is not enforceable through coercive contempt sanctions when the court enters the injunction in aid of its jurisdiction. For instance, if a government official is enjoined to perform a certain act, and another individual tries to prevent the official from performing the act, the court could issue an injunction commanding the individual to cease his interference. Such an injunction would be appropriate despite not being enforceable through coercive sanctions, because the injunction was not entered as a form of relief for a party to a lawsuit, and thus there is no issue as to whether that party would have an adequate remedy at law. Cf. 18 U.S.C. § 1509 (1994) (authorizing injunctive relief against persons who forcefully interfere with the performance of duties under a court order, regardless of whether the conduct enjoined is also independently criminal).

Finally, I am not denying the importance of the injunction in modern jurisprudence. The principles

outlined above would have permitted, for instance, the use of the injunction in school desegregation cases. In such cases, the defendants were enjoined to undertake a specific, albeit complex, act: Create a unitary school system. Theoretically, the defendants could have been jailed until such time as they complied with the court's mandate.[16] Once the commanded act had been done, however, the court's mandate would have been fully obeyed and any contempt would have been purged.

F.

In conclusion, when a party seeks an injunction to create criminal and/or civil liability via the court's contempt powers, rather than to coerce an adverse party into taking an action required of it, that party is using the legal device of an injunction for a purpose for which it was not designed.[17] See Hecht Co. v. Bowles, 321 U.S. 321,

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[16] The more common approach was to require school districts to submit to the court a plan for creating a unitary school system; if the plan was approved by the court, the court would retain jurisdiction to see if implementation of the plan succeeded in fulfilling the court's mandate. See, e.g., Brown v. Board of Educ. of Topeka, Kan., 139 F. Supp. 468, 470 (D. Kan. 1955). When various obstacles prevented fulfillment of the mandate – for instance, outside interference or obstinacy by certain officials – courts often issued injunctions in aid of their jurisdiction (sometimes enforceable only through punitive contempt sanctions, as discussed supra) to ensure compliance with their initial orders.

[17] Indeed, if such an action were taken by a plaintiff deliberately, it would likely amount to the tort of abuse of process. Cf. Dykes v.

329, 64 S. Ct. 587, 592, 88 L. Ed. 754 (1944) ("The historical injunctive process was designed to deter, not to punish."). Such an injunction provides no relief for the plaintiff (or at least no relief that could not be obtained at law), and intrudes into areas constitutionally reserved for the legislative and executive branches. Therefore, when a court is faced with a request for injunctive relief, it should consider how the requested injunction is to be enforced. If the injunction cannot be enforced using coercive sanctions, then it should not be entered.[18]

II.

The appellants in this case challenge two sets of

Hosemann, 776 F.2d 942, 950 (11th Cir. 1985) (Tjoflat, J., concurring in part and dissenting in part).

[18] An exception that proves the rule can be found in the area of securities law. Most SEC enforcement actions are resolved by injunctions (entered pursuant to consent decrees) that order the defendant essentially to do nothing more than obey the securities laws. See, e.g., SEC v. Clifton, 700 F.2d 744, 746 (D.C. Cir. 1983). These injunctions allow the SEC to punish repeat offenders without having to bring a separate lawsuit for each offense; instead, the commission needs only to request a show cause hearing to obtain sanctions against the offender. See id. at 748. This practice is permissible, however, only because Congress has specifically authorized it in the Securities Act of 1933. See 15 U.S.C. § 77t(b) (1994); SEC v. Jones, 85 F.2d 17, 17 (2d Cir. 1936) (noting that, because of the Securities Act, the SEC need not allege the absence of an adequate remedy at law when seeking injunctive relief). This specific congressional authorization suggests that such a practice would be impermissible if not so authorized.

provisions in the injunction entered by the district court. The first set of injunctive provisions enjoins the members of the DeKalb County Board of Education and the employees of the DeKalb County school system (such as principals and teachers) not to permit students to engage in various forms of religious activity.[19] For instance, the defendants were enjoined from "permitting . . . vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature" in the DeKalb County schools. The defendants were also enjoined from "permitting . . . prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises." Similar provisions were included in regard to public-address systems and school-sponsored assemblies and events.

These provisions, for the reasons outlined in part I, were entered in error. It is clear that the provisions are not enforceable through coercive sanctions. For instance, assume that a DeKalb County school principal violates the injunction by "permitting" a student prayer at graduation.[20]

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[19] The members of the DeKalb County Board of Education (and their successors in office) are the defendants in the lawsuit. The injunction extends to the employees of the school system on the ground that they are "in active concert and participation with" the defendants.

[20] In addition to the problems with the injunction outlined above, the injunction's command that the defendants not "permit" certain activity is too vague to satisfy the requirements of Fed. R. Civ. P.

Plaintiff Jesse Chandler is present at the graduation, and, after hearing the prayer, obtains a show cause hearing from the district court.[21] At the hearing, the court holds the principal in contempt. In this situation, the harm sought to be prevented by the injunction – namely, the violation of Chandler's Establishment Clause rights[22] – would already have occurred, and the court could do no more than punish the principal for his contempt or attempt to compensate Chandler for the harm caused. The only form of coercive relief imaginable under the circumstances would consist of

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65(d). See American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1411 (11th Cir. 1998); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1531 (11th Cir. 1996). What exactly does it mean, for instance, for a principal to "permit" a prayer at a school's graduation? Does it mean merely that if he is aware that a student speaker is going to pray, then he must ask the student not to do so? Must he prevent the student from speaking altogether once he is aware that the student is inclined to pray? If a student speaker surprises the principal with a prayer at graduation, must he, at once, rush on stage and attempt physically to remove the student from the microphone? This vagueness makes it impossible for the defendants to know exactly what the injunction requires of them.

[21] The only plaintiffs in the case against the DeKalb County Board of Education are Michael Chandler and his son Jesse, a seventh-grade student in the DeKalb County school system. Michael Chandler appeared as "next friend" for his son.

[22] I seriously doubt, in light of the majority's analysis, that a principal who permits a prayer, without more, has violated a student's Establishment Clause rights. For purposes of my analysis, however, I will assume the correctness of the district court's conclusion to the contrary.

fining or imprisoning the principal until such time as the district court was convinced (presumably on the basis of nothing other than the principal's sincere-sounding promises) that he would not repeat the offense; even then, the coercive sanctions would not have provided Chandler with any relief because the harm would still be fully accomplished. Cf. Gompers, 221 U.S. at 442, 31 S. Ct. at 498. Thus, only punitive or compensatory sanctions would be available.

Insofar as the injunction would be enforced via punitive contempt sanctions, it would provide no direct relief to Chandler. The only benefit it would bring to Chandler would be a deterrent to the principal, one which would be equally available in an action for damages under 42 U.S.C. § 1983 (1994). Thus, the injunction, if enforced by punitive contempt sanctions, gives Chandler no better relief than that which he could obtain at law.

Furthermore, enforcing the injunction with punitive contempt sanctions would raise a separation-of-powers problem. A necessary prerequisite for the issuance of the injunction was the district court's conclusion that the behavior to be enjoined – for instance, permitting a prayer at graduation – would constitute a violation of Chandler's constitutional rights. Therefore, punitive sanctions in response to a violation of the injunction would in essence be punishment for violating Chandler's constitutional rights. The legislature, however, has already prescribed the appropriate criminal punishments for violations of constitutional rights in 18 U.S.C. § 242 (1994), which states that whoever, under color of law, "willfully subjects any person . . . to the deprivation of any rights, privileges,

or immunities secured or protected by the Constitution or laws of the United States . . . , shall be fined under this title or imprisoned not more than one year, or both."[23] The enforcement of this provision is the job of the executive branch, meaning that Congress has determined that the United States Attorney, not the judiciary, is to determine whether the principal should be prosecuted. In such a prosecution, the full panoply of constitutional protections would apply, rather than the limited set that has been held to apply to the imposition of criminal contempt sanctions. See supra note 4. Furthermore, in a criminal prosecution, the principal could raise the defense, based on the "fair warning" requirement of the Due Process Clause, that section 242 does not clearly prohibit "permitting" a prayer at graduation. See United States v. Lanier, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432 (1997) (discussing, in the context of a section 242 prosecution, the constitutional requirement that the statute under which the defendant is prosecuted must have "made it reasonably clear at the relevant time that the defendant's conduct was criminal"). Such a defense would be unlikely to be available in a contempt hearing, because the injunction – unlike the statute – explicitly prohibits this behavior. In sum, criminal sanctions based on this injunction would

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[23] Conspiracies to violate this provision are outlawed by 18 U.S.C. § 241 (1994), which authorizes fines and imprisonment of up to ten years. Thus, if the United States Attorney could demonstrate that the principal conspired with, for instance, one or more members of the DeKalb County Board of Education to permit the prayer, it could obtain convictions under section 241 in addition to section 242.

constitute interference with the role of both the legislative and executive branches.[24]

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[24] Congress has responded to this problem to some degree in 18 U.S.C. § 402 (1994), titled, "Contempts constituting crimes." Under that section, where conduct constituting contempt of a district court order also constitutes a crime under federal or state law, the alleged contemnor is entitled to a trial by jury. Furthermore, the contemnor cannot be sentenced to more than six months imprisonment and cannot be assessed a punitive fine of more than $1,000.

One could contend that this statute implicitly authorizes the sort of "end run" around criminal procedure that I am attacking, and thus eliminates any separation-of-powers problem. After all, why would Congress pass a law prescribing procedures and penalties for contempts constituting crimes if it did not consider injunctions necessarily leading to such contempts (if disobeyed) to be acceptable?

A look at the legislative history of section 402 dispels this contention. Section 402 was passed in 1914 to prevent the abuse of labor injunctions. Congress was concerned that corporations were obtaining injunctions forbidding certain union activity; these injunctions were then enforced through summary contempt proceedings. (The constitutional protections that are now available in criminal contempt proceedings, see supra note 4, were not available at that time.) The result was the imposition of penalties for violations of the criminal law, but without the benefit of a jury trial. Section 402 was intended to minimize this problem. See United States v. Pyle, 518 F. Supp. 139, 152 (E.D. Pa. 1981) (discussing legislative history); 48 Cong. Rec. 8778 (1912) ("The courts have, under the guise of contempt of court, had men arrested and tried for crimes without the intervention of a jury." (statement of Rep. Clayton)).

In light of this legislative history, it is difficult to read section 402 as Congress' stamp of approval on injunctions enforceable only through punitive (or compensatory) sanctions. On the contrary, section 402 arises out of disapproval of such

Insofar as this injunction would be enforced via compensatory contempt sanctions, it would merely be imitating the relief available to Chandler under 42 U.S.C. § 1983. Again, as with punitive sanctions, the injunction would give Chandler no relief different from that which he could obtain at law.[25]

It would, however, provide that relief in a manner contrary to that which Congress contemplated in enacting

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injunctions. See id. at 8779 ("This bill is to prevent a man or, say, a corporation, rich and powerful, getting out a blanket injunction at midnight, broad as the canopy of heaven in its terms, and then oppressing the poor, humble laborer." (statement of Rep. Clayton)). The fact that Congress chose to address the problem by limiting the damage at the back end (when contempt sanctions are imposed) in no way implies approval of the practice at the front end (when the injunction is issued). Cf. id. at 8798 (quoting statement of Rep. Sabath that the bill is not as broad as it should be, but is a step in the right direction).

Furthermore, had Congress intended so radical a move as to abolish completely the longstanding equitable principle that equity will not enjoin a crime, see supra note 14, it surely would have said something to indicate such an intent. Cf. Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S. Ct. 587, 591, 88 L. Ed. 754 (1944) ("We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."). Nothing in the legislative history suggests that this is the case.

[25] The fact that exhaustion of state remedies is not required in section 1983 actions does not alter the requirement that a plaintiff seeking injunctive relief on the basis of section 1983 must demonstrate the absence of an adequate remedy at law. See Wallace v. Kern, 520 F.2d 400, 407 n.13 (2d Cir. 1975).

section 1983, again creating a separation-of-powers problem.[26] For instance, in a section 1983 proceeding, the principal would be entitled to a trial by jury; this right is not guaranteed in a civil contempt proceeding. Furthermore, in an ordinary section 1983 suit, the principal could respond to the complaint with a motion to dismiss for failure to state a claim. If that failed, the principal could assert a defense of qualified immunity, on the ground that liability for "permitting" a prayer at graduation is not clearly established by Supreme Court or Eleventh Circuit precedent.[27] Neither of these responses is generally available in a civil contempt proceeding. Thus, unless the

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[26] This problem might not arise if the alleged violation of Establishment Clause rights was caused by a federal, rather than a state, official. Under those circumstances, the congressionally-created remedial scheme of section 1983 would be inapplicable, and a judicially-created remedial scheme based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), in which a cause of action is implied from the Constitution, would apply. (The adequate-remedy-at-law problem would of course remain.) In this case, however, Congress has created a remedial scheme for the constitutional violation (section 1983) and therefore, in the absence of a showing that the congressional scheme is inadequate, the courts are to defer to Congress. See McCarthy v. Madigan, 503 U.S. 140, 151, 112 S. Ct. 1081, 1090, 117 L. Ed. 2d 291 (1992).

[27] "[T]he qualified immunity test is simply the adaptation of the fair warning standard [from criminal law] to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." Lanier, 520 U.S. at 270-71, 117 S. Ct. 1227.

show cause hearing were in effect transformed into a new section 1983 suit – with a jury trial, the opportunity to raise defenses, and so forth – the court would be violating the doctrine of separation of powers.

The second set of provisions challenged by the appellants, unlike the first set, was perfectly appropriate for inclusion in an injunction. Those provisions relate to the district court's command that the defendants (in conjunction with the plaintiffs) nominate three individuals, one of whom would serve as a monitor for the purpose of ensuring compliance with the injunction. This is a discrete act that, if not taken, could be compelled through coercive contempt sanctions (for instance, a fine of $100 for each day after the deadline that the list of individuals was not submitted). It was therefore properly the subject of an injunction.[28]

In conclusion, the first set of injunctive provisions

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[28] The unchallenged portions of the injunction are a mix of proper and improper provisions. For instance, in addition to enjoining the defendants from "permitting" certain religious activities, it also enjoins them from "aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in" those activities. Regardless of which gerund is chosen, these injunctive provisions still forbid the performance of an act, and are therefore inappropriate. Other provisions, however, enjoin the defendants to promulgate a written policy relating to religious activity in schools, to provide the Gideons with a copy of the injunction, and to conduct a training session to instruct faculty and administrators regarding the Establishment Clause and the Free Exercise Clause. These provisions command the performance of specific acts, and are thus, at least in form, perfectly legitimate.

challenged by the appellants are enforceable only through punitive or compensatory contempt sanctions. They consequently raise all of the problems discussed in part I, and therefore must be vacated. The second set of provisions, however, raise none of those problems, and, for the reasons stated in the majority opinion, should be affirmed.

III.

The injunction is an important remedial tool, but also one that has been greatly abused. By using an injunction as an alternative means of creating criminal and/or civil liability, courts ignore fundamental equitable and constitutional principles. Certain injunctive provisions at issue in this appeal illustrate this problem. I therefore concur in the majority opinion.

Appendix C

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, father and
next friend of JESSE CHANDLER,

versus

Case No.
99-935

DON SIEGELMAN, in his capacity as
GOVERNOR OF ALABAMA AND
PRESIDENT OF THE ALABAMA
STATE BOARD OF EDUCATION, *et al.*

(June 26, 2000)

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Petition for a writ of certiorari granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Santa Fe Independent School District* v. *Doe*, 530 U.S. --- (2000).

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

v. **CIVIL ACTION NO.**
96-D-169-N

FORREST H."FOB" JAMES JR., et al.,

Defendants.

ORDER

Before the court is a "Motion For Partial Stay Of Permanent Injunction" ("Defs.' Mot.") filed on November 10, 1997 by the Attorney General of the State of Alabama, the Alabama State Board of Education and its individual members, and the DeKalb County, Alabama, Board of Education and its individual members ("Defendants").

Defendants filed a "Memorandum In Support" ("Defs.' Mem. In Supp.") on the same date. Plaintiffs filed their "Opposition To 'Defendants' Motion To Stay' " ("Pls.' Opp'n") on November 18, 1997 to which Defendants filed a Reply ("Defs.' Reply") on November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion To Stay' " ("Pls.' Supplemental Opp'n"), and the "Declaration Of Susan Jane Neely In Opposition To 'Defendants' Motion To Stay' Injunction" ("Neely Decl."). On December 5, 1997, Plaintiffs filed their "Reply To '[Defendants'] Reply to Plaintiffs' Opposition To Defendants' Motion For Partial Stay,' " ("Pls.' Reply"), and the Declaration of John Woodfin ("Woodfin Decl.").[1] On December 4, 1997, counsel for the DeKalb County Board of Education and its Superintendent, filed a "Report to Court of Counsel of DeKalb County Board of Education, et al." ("DeKalb Sch. Bd. Report To Ct.") On December 15, 1997, Plaintiffs filed their "Additional Evidence In Opposition To Defendants' Motion For Stay." ("Pls.' Add. Evid.").

Defendants move the court, pursuant to Rule 62 of the

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[1] Woodfin's Declaration was originally filed in handwritten form as Exhibit B to Plaintiffs' Supplemental Opposition filed November 24, 1997. The December 5, 1997 filing was typed and formally executed.

Federal Rules of Civil Procedure, for a stay of sections 6(a), 6(b), 6(c), 6(d), 6(e) and 7 of the court's October 29, 1997 Permanent Injunction ("Permanent Inj."), pending review by the Eleventh Circuit Court of Appeals. (Defs.' Mot. at 1.) Defendants contend that these sections of the Permanent Injunction are "vague and overbroad." (Defs.' Mem. In Supp. at 1.) Plaintiffs argue that the "proscriptions are all specific and under the totality of the circumstances give ... an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.) After careful consideration of the arguments of counsel, as well as relevant law, the court finds that Defendants' "Motion For Partial Stay Of Permanent Injunction" is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied.

DISCUSSION

On March 12, 1997, the court issued a Memorandum Opinion and Order finding unconstitutional Alabama Code Section 16-1-20.3, Alabama's fourth incantation of a "school prayer" statute. *Chandler v. James,* 958 F. Supp. 1550, 1568 (M.D. Ala. 1997). The challenge to the statute arose in the context of officially initiated, promoted and/or sanctioned religious activity that was occurring in the public schools of DeKalb County, Alabama. On October

29, 1997, the court issued a Permanent Injunction enjoining various state and local officials from enforcing Alabama Code Section 16-1-20.3. (*See* Permanent Inj. at 1-3.) The Permanent Injunction also prohibited a variety of officially initiated, promoted and/or sanctioned activities that the court found to be in violation of the First Amendment.[2] (*Id.* at 3-12.) Provisions were made to ensure compliance and to protect the rights of those citizens who were subject to the activity found unconstitutional. (*Id.* at 3-16.) In the Motion To Stay currently before the court, Defendants do not challenge those portions of the Permanent Injunction prohibiting enforcement of Alabama Code Section 16-1-20.3; their challenge is limited to specific sections of the Permanent Injunction applicable to DeKalb County, Alabama.[3]

For purposes of clarity, and in order to rectify

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[2] In addition to the March 1997 Memorandum Opinion and Order, the court's findings were articulated in its November 1997 Supplemental Opinion and Order and November 1997 Memorandum Opinion and Order.

[3] The Defendants, speaking through the Attorney General, stated that they are "not challenging this Court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling legal precedent.... For purposes of Defendants' Motion For Partial Stay, the Attorney General is only challenging certain provisions of this Court's October 29, 1997 Permanent Injunction." (Defs.' Reply at 2.)

convoluted interpretations of the terms of the court's Permanent Injunction, the court will: (1) state the applicable law; (2) restate the specific provisions of the Permanent Injunction that are at issue; (3) summarize the arguments of counsel; and (4) analyze the arguments of counsel in light of applicable law and the terms of the Permanent Injunction.

I. APPLICABLE LAW

A. Standard Of Review

Rule 62(c) of the Federal Rules of Civil Procedure provides that "the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." *Fed. R. Civ. P.* 62(c). In *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987), the Supreme Court stated that:

> Different Rules of Procedure govern the power of district courts and courts of appeal to stay an order pending appeal. *See* Fed. Rule Civ. Proc. [sic] 62(c); Fed. Rule App. Proc. [sic] 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

> (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton, 107 S. Ct. at 2119 (citations omitted).[4] These factors "contemplate individualized judgment in each case, [and] the formula cannot be reduced to a set of rigid rules." *Id.*

Defendants urge the court to also consider their Motion under what they describe as the "alternate standard" outlined by the Eleventh Circuit in *Garcia-Mir v. Meese,* 781 F.2d 1450, 1453 (11th Cir.1986). (Defs.' Mem. In Supp. at 3.) There, the Eleventh Circuit, as quoted by the Defendants, stated that "[o]rdinarily the first factor is the most important ... [b]ut the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." (Defs.' Mem. In Supp. at 3 (citing *Garcia-Mir,* 781 F.2d at 1453).) Defendants argue that they are "not only likely to prevail on appeal, but the last

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[4] The parties agree that these factors guide the court's analysis in assessing a request for a stay. (*See* Defs.' Mem. In Supp. at 3; Pls.' Opp'n at 5-6.)

three factors weigh heavily in favor of granting the stay. Therefore, the movants are entitled to prevail under the Eleventh Circuit's alternate standard." (*Id.*)

As an initial matter, the court notes that in *Garcia-Mir,* the Eleventh Circuit addressed an "emergency motion to stay" filed in the court of appeals, rather than in the district court in which the action originated. *Garcia-Mir,* 781 F.2d at 1451, 1453; *see also, United States v. Bogle,* 855 F.2d 707 (11th Cir.1988) (applying factors articulated in *Garcia-Mir* in context of emergency appeal before the Eleventh Circuit and citing to Eleventh Circuit Rule 27-1(b)).[5] The Eleventh Circuit specifically noted the

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[5] Eleventh Circuit Rule 27-1(b) provides:

> (b) Emergency Motions.
>
> (1) A party requesting emergency action shall label the motion as "Emergency Motion" and state the nature of the emergency and the date by which action is necessary. The motion or accompanying memorandum shall state the reasons for granting the requested relief and must specifically discuss: (i) the likelihood the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest. Counsel filing the motion shall make every possible effort to serve the motion personally; if this is not possible, counsel shall notify opposing counsel promptly by telephone.
>
> (2) If the emergency motion raises any issue

"emergency" nature of the motion to stay at issue there, and noted the "extraordinarily high standards of review of motions for emergency stays." *Id.* at 1451, 1454. In contrast, the Motion To Stay at issue in this action was filed with *this* court, a United States District Court, not the Eleventh Circuit Court of Appeals, and is in a non-emergency posture.

Utilization of the four *Hilton* factors in an "emergency" context ordinarily entails analysis of substantially more compelling factual and legal circumstances than in ordinary motions to stay. Predictably, that is why provisions are made for

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theretofore raised in a district court, counsel for the moving party shall furnish copies of all pleadings, briefs, memoranda or other papers filed in the district court supporting or opposing the position taken by the moving party in the motion and copies of any order or memorandum decision of the district court relating thereto. If compliance is impossible or impractical due to time restraints or otherwise, the reason for non-compliance shall be stated.

(3) An emergency motion, whether addressed to the court or an individual judge, ordinarily should be filed with the clerk and not with an individual judge. To expedite consideration by the court in a genuine emergency, counsel may telephone the clerk and describe a motion that has not yet been filed in writing. This is not a substitute for the filing required by FRAP 27(a).

"emergency" motions, and why the factors may be entitled to different weight in that context. In an "emergency" appellate proceeding, emphasis may be placed on the likelihood of success on the merits, in part because the appellate court must determine that the trial court below was "clearly erroneous." *Garcia-Mir,* 781 F.2d at 1453. Once this determination is made, the likelihood of reversal on appeal may justify granting a stay, regardless of the other three factors. That is also why a showing of a "substantial case on the merits" coupled with the other three factors weighing heavily in favor of the movant may justify a stay. *See Garcia-Mir,* 781 F.2d at 1453. Hence, emphasis on the first factor, in those contexts, is warranted.

Tellingly, in *Hilton,* the Supreme Court was not addressing the standards utilized in "emergency" appellate proceedings, or "emergency" district court proceedings for that matter, and made no mention of applying heightened deference to the first *Hilton* factor in district court proceedings. *Hilton,* 481 U.S. at 776-77. The Court was careful to note, however, that "individualized judgments" must be made in each case, and that "the formula cannot be reduced to a set of rigid rules." *Id.* at 776.

Not only do Defendants conveniently fail to note the emergency, appellate, posture of *Garcia-Mir,* as opposed to the non-emergency posture of the Motion To Stay

currently in this court, they also fail to cite the entirety of the Eleventh Circuit's relevant language in *Garcia-Mir* (the language quoted by Defendants is italicized):

> We must always be diffident in interposing the power of an appellate court into the province of the trial court and its orders save upon full briefing and mature reflection by this Court. The grant of an emergency motion to stay the trial court's mandate is thus an exceptional response granted only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay. *Ordinarily the first factor is the most important.* A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. But the movant may also have his motion granted upon a lesser showing of a "substantial case on the merits" when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay.

Garcia-Mir, 781 F.2d at 1453 (citations omitted). The emphasis placed on the first factor was clearly done in the context of an "emergency" appellate review of a district court order. Use of the *Garcia-Mir* standard by a district court would essentially require the court to determine that it was clearly erroneous in issuing a staying of its order(s). Such analysis would be more appropriate in determining a Rule 59 motion to alter or amend or a Rule 60 motion for relief from a judgment or order--not a motion to stay pending appeal.

Regardless of whether the court applies the *Hilton* factors without emphasis on one over the other, or whether the court applies the *Garcia-Mir* heightened emphasis on the first factor standard, an "individualized judgment" under either leads the court to the conclusion that Defendants' Motion To Stay is due to be granted as to twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction, and otherwise denied. *See Hilton*, 481 U.S. at 776.

The first *Hilton* factor entails analysis of whether the applicant for the stay has made a "strong showing that he is likely to succeed on the merits," *id.*, while under *Garcia-Mir*, a stay may be warranted if the movant shows the "probable likelihood" of success on the merits. *Garcia-Mir*, 781 F.2d at 1453. This would require a

determination that the trial court was "clearly erroneous." *Id. Garcia-Mir* also allows for the granting of a motion to stay upon a "lesser showing of a 'substantial case on the merits' when the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Garcia-Mir,* 781 F.2d at 1453. This "lesser showing" is thus nothing more than a conjunctive application of the *Hilton* factors without emphasis on one over the others. A stay is warranted if the movant satisfies *all four* of the elements articulated in *Hilton.* Indeed, the *Garcia-Mir* court noted that even if the movant's likelihood of success on the merits is "substantial," that alone will not support a stay "when the other three factors we must consider point so strongly in the other direction." *Id.* at 1455.

The court's Permanent Injunction was issued after much forethought and deliberation, based on its March 1997 Memorandum Opinion And Order and on its findings based on its review of the record as articulated more fully in its November 1997 Memorandum Opinion And Order and November 1997 Supplemental Opinion And Order. Upon issuance of its Permanent Injunction, the court did not consider the provisions at issue here to be clearly erroneous then, and it declines to so find now. Nor does the court consider the majority of the Attorney General's

objections, arguing that the Permanent Injunction tramples free expression in its proscription of state established religion, to be well founded.

The court finds that Defendants have neither shown that they are likely to prevail on the merits nor that they have a substantial case on the merits. Apparently the court's forty page March 1997 Memorandum Opinion And Order, the court's seventeen page October 1997 Permanent Injunction, the court's twenty-four page November 1997 Memorandum Opinion And Order, and the court's sixty-two page November 1997 Supplemental Opinion and Order did not make the court's findings sufficiently clear or were ignored: the religiously coercive practices that were ongoing in DeKalb County, Alabama, violate the First Amendment to the United States Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. These violations necessitated the court's Permanent Injunction.

The court is aware of the narrow scope of the Defendants' Motion; Defendants merely contend that the provisions of the Permanent Injunction proscribing unconstitutional conduct are "vague" and "overbroad," and that they accordingly "hinder" free expression, not that the

underlying actions enjoined are permissible.[6] Nevertheless, as the court has previously made clear, and as the court finds now, given the state of current First Amendment jurisprudence, as articulated by courts with direct authority over this court, as well as the legal standards applicable to the issuance of permanent injunctions, the Defendants have not made a "strong showing" or exhibited a "probable likelihood" of success on the merits. With the exception of a portion of section 6(a) discussed *infra,* the court finds that the Permanent Injunction meets its remedial purpose of proscribing unconstitutional conduct without unduly burdening free expression rights. *See, e.g., Lucero v. Trosch,* 121 F.3d 591 (11th Cir.1997) (citing *Schenck v. Pro-Choice Network,* 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997), and *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), and utilizing analysis of whether injunction provisions burden more speech than necessary to serve relevant government interests). Indeed, this court champions the free expression rights of the citizens of the State of Alabama and of the United States, exercised, of course, in concert with other First Amendment rights.

The court finds the portions of Plaintiffs'

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[6] *See* note-3, *supra.*

Memorandum In Opposition regarding Defendants' likelihood of success on the merits on appeal to be clear, concise, eminently well written, and most importantly, a correct review of applicable law. Accordingly, the court adopts those portions of Plaintiffs' Memorandum In Opposition as herein articulated:

> The October 29 injunction should have come as no surprise to anyone at all familiar with Establishment Clause jurisprudence. Public school officials have long been prohibited by the Establishment Clause of the First Amendment to the United States Constitution from inserting religious exercises into school activities. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (prayer at graduation assemblies); *Edwards v. Aguillard,* 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (requirement to teach "creation science"); *Wallace v. Jaffree,* 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (daily prayer in public school classrooms); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (classroom prayer by students or teachers); *Stone v. Graham,* 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199

(1980) (posting copy of Ten Commandments on public school classroom walls); *Epperson v. Arkansas,* 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (statute prohibiting the teaching of evolution); *Abington Schl. Dist. v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Bible reading before class by student volunteers); *Engel v. Vitale,* 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (nonsectarian prayer at beginning of school day); *Illinois ex rel. McCollum v. Board of Educ.,* 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) (religious instruction on school property during school day). These unconstitutional school-sponsored activities are not transformed into constitutional activities by the involvement of willing students. *See Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 44 (student-led devotional readings in the classroom); *ACLU v. Black Horse Pike Regional Bd. of Educ.,* 84 F.3d 1471 (3d Cir.1996) (*en banc*) (student-initiated prayer at graduation); *Ingebretsen v. Jackson Public Schl. Dist.,* 88 F.3d 274 (5th Cir.), *cert. denied,* --- U.S. ----, 117 S. Ct.

388, 136 L. Ed. 2d 304 (1996)[7] (student initiated prayer at compulsory and noncompulsory school sponsored events); *Jager v. Douglas County Bd. of Educ.*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989) (student-led prayers and invocations at high school sporting events);[8] *Hall v. Board of Schl. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981) (student-led morning devotionals over the school intercom); *Collins v. Chandler Unified Schl. Dist.*, 644 F.2d 759 (9th Cir.1981) (student-led prayer at school

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[7] *Ingebretsen*, constrained by *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir.1992), held that "nonsectarian, nonproselytizing student-initiated prayers" at graduation ceremonies did not violate the Establishment Clause, while simultaneously holding that those same prayers at all other school-sponsored compulsory or noncompulsory activities did. The Fifth Circuit is the only Circuit to adopt the graduation ceremony exception to the Establishment Clause, and the Fifth Circuit's rule is directly defiant of *Lee v. Weisman*.

[8] Although one might think that any claim of success on appeal in the Eleventh Circuit would focus on the leading Eleventh Circuit case, *Jager v. Douglas County Board of Education*, 862 F.2d 824 (11th Cir.), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989), *Jager* is almost completely absent from the Attorney General's discussion, making only a brief parenthetical appearance on page 13 of the Motion for Partial Stay.

assemblies); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.1981), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982) (student-led prayers in the classroom).

The "free exercise" and "free speech" rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations. The plaintiffs have argued this since the inception of this case, and the court so found in citing *Barnette, Schempp,* and *Jager.* None of this record supports the Attorney General in what the plaintiffs take to be a motion to stay premised on the allegation that the injunction amounts to viewpoint discrimination, and the pretense that it does is at odds with the record. [12]

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[12]This Court might well say, like the *Ingebretsen* court:

> The Attorney General's ... proffered secular purpose of prayer at student sporting events--prohibiting viewpoint discrimination--must be rejected out of hand. While the United States Supreme Court has recognized that prohibiting viewpoint discrimination may serve a secular purpose, *see Mergens,* 496 U.S. at 248, 110 S. Ct. at 2370, the Attorney General has not shown that any of the forums where student prayer is authorized under the statute are open forums and that religious groups have been denied access. The *Mergens* line of cases cited by the Attorney General involves situations

Relatedly, free speech rights are not absolute. Where "the degree of captivity makes it impractical for the unwilling viewer to avoid exposure," a speaker does not have the absolute right to say exactly what he wants. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). While a speaker "clearly has a right to express his views to those who wish to listen, he has no right to force his

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> where religious groups sought access to public school facilities and were denied for fear that access to these facilities by religious groups would violate the Establishment Clause.... We are not faced with such a situation here. Student assemblies, student sporting events, graduation or commencement, and other school-related activities ostensibly are not open forums in public schools. By granting prayer an exalted status over other types of speech in these forums, the state runs the grave risk of favoring one religion over another or favoring religion over irreligion. *See Board of Educ. of Kiryas Joel v. Grumet,* 512 U.S. 687, 114 S. Ct. 2481, 2491, 129 L. Ed. 2d 546 (1994).

Ingebretsen, 864 F. Supp. at 1490.

The record here shows no instance in which a religious group has ever been denied anything in DeKalb County. Quite the opposite is true; the Gideons have been handed the classrooms. The plaintiffs repeat, as they have argued throughout this case, that violating the Establishment Clause is not a free speech or free exercise right.

message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974) (upholding a ban on political ads in rapid transit cars based upon the captive audience). *See also Frisby v. Schultz,* 487 U.S. 474, 487-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (allowing a city to limit picketing in front of homes so as to protect persons from unwanted speech while at home).

Students enjoy even less freedom to speak their minds while under the supervision of the public schools. In *Bethel School District v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), cited by the Attorney General, the Court recognized that the free speech rights of students are not co-extensive with the free speech rights of adults. *Id.* at 682. The *Fraser* Court also noted "the obvious concern on the part of parents and school authorities ... to protect children--*especially in a captive audience* --from exposure to" certain speech in school assemblies. *Id.,* 478 U.S. at 684 (emphasis added). *See* Mem. Op., Mar. 12, 1997 at 21 (*quoting Fraser.*)

Previously, in *Tinker v. Des Moines Independent*

School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), the Court discussed the limitations on students' rights to speak freely: "[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. *See* Mem. Op., Mar. 12, 1997 at 20 (*quoting Tinker*). While the Supreme Court held that the *Tinker* student had a First Amendment right to engage [sic] in the activity at issue (the wearing of a black armband), it first held that this speech did not "impinge upon the rights of other students." 393 U.S. at 509.

The *Jager* court addressed the same concerns raised by the Defendants in this case, and concluded that student-initiated prayers, even at "noncompulsory" events such as football games, violate the Establishment Clause.

In *Jager,* the defendant high school had a practice of permitting prayers and invocations immediately prior to the high school's home football games. *Jager,* 862 F.2d at 826. The prayers were

explicitly Christian, "frequently invok[ing] the name of Jesus Christ," and were delivered by members of the local Protestant clergy. *Id.* at 826, 841 n. 2. Since at least 1947, these pregame prayers had been a part of the defendant's football season. *Id.* at 841 n. 2. In response to complaints about the old policy, the school developed a new policy:

> All school clubs and organizations can designate club members to give invocations and any student, parent, or school staff member can seek to deliver an invocation ... the student government will randomly select the invocation speaker and no ministers will be involved in selecting invocation speakers or in delivering invocations. In addition, the schools will not monitor the content of the invocations.

Jager, 862 F.2d at 827.[13] Despite these innovations, the *Jager* court still concluded that the policy was in violation of the Establishment Clause.

Lee indicates how right the Eleventh Circuit was

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[13] As noted earlier, this was not an official Douglas County School Board policy but rather, vested discretion in school principals.

in *Jager*. The Supreme Court's holding in *Lee* is summarized in its last paragraph which, like the vast majority of the decision, makes no reference to the fact that the prayer was offered by clergy under some particular guidelines and does not take into account the identity of the speaker:

> **The sole question presented** is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

Id., 505 U.S. at 599 (emphasis added). In short, the sole *relevant* facts are the same here as in *Lee:* (1) prayer in a school program, and (2) a coerced plaintiff. (Pls.' Mem. In Opp'n at 32-38.) Based on the foregoing, the court finds that the first *Hilton* factor cuts against the Defendants.[14]

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[14] The court addresses the hypotheticals proffered by the Attorney General in support of his "likelihood of success on the merits" argument, *infra*.

> In addition, the other three *Hilton* factors strongly favor Plaintiffs' position. The second and third factors essentially require the court to weigh the harm that Defendants may incur absent a stay against the harm that Plaintiffs may incur should a stay be granted. Defendants argue that "the movants and other citizens of Alabama are likely to suffer irreparable harm if this Motion is not granted." (Defs.' Mot. at 2.) Closely associated with the court's analysis of the second and third factors are Defendants' contentions regarding the fourth factor: "whether the granting of the stay would serve the public interest." Defendants argue that "the public interest would be served by granting [a stay] in order that the status quo may be preserved pending appeal." (Defs.' Mot. at 2.) Essentially, the Attorney General argues that because he reads the injunction as unduly limiting free expression rights, the better path would be to preserve the status quo pending appeal. Plaintiffs counter that "the *status quo* has been an illegal state of affairs in DeKalb County, Alabama."

(Pls.' Opp'n at 6 (emphasis in original).)

As noted, the court finds that Defendants have not shown a likelihood of success on the merits; specifically,

that the court's Permanent Injunction does not unduly burden free expression rights in its preservation of individual liberties and proscription of state established religion. Additionally, throughout its previous Orders, the court has expressed its findings that public policy favors Plaintiffs in this action. The status quo, which the Attorney General urges this court to continue, includes, but is not limited to, state sponsored and officially sanctioned religious activity in the DeKalb County schools. Indeed, the Attorney General is not challenging the factual record or thirty years of controlling precedent. (Defs.' Reply at 2.) Nevertheless, by tying arguments urging preservation of the status quo because of what the Attorney General perceives to be an undue burden on free expression rights with analysis under *Hilton* 's harm to the Defendants and public interest factors, the Attorney General essentially argues for preservation of majoritarian will. As the Attorney General should know, however, the will of the majority makes for sound argument in election disputes and political grandstanding; not in the analysis of First Amendment jurisprudence prohibiting officially sanctioned religious activities that violate the First Amendment.

At a minimum, the status quo in DeKalb County violates the First Amendment's dictate that states "pursue a course of complete neutrality toward religion." *Jager v.*

Douglas County School Dist., 862 F.2d 824, 828 (11th Cir.1989) (citing *Wallace v. Jaffree*, 472 U.S. 38, 60, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)).[15] Further, the status quo violates the interests of those counter-majoritarian citizens who choose to exercise religious beliefs, or who choose to not exercise religious beliefs, by forcing upon them, in an official setting, religious beliefs and practices that they may find unwelcome and that smack of state indorsement. The exercise of free expression rights do not justify violations of the Establishment Clause. *See, e.g., Bethel School District v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.2d 125 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731 (1969). Consequently, the court finds no merit in Defendants' argument that execution of the Permanent Injunction will result in the harm anticipated by the Defendants.

In addition, the court finds that absent execution of the Permanent Injunction, Plaintiffs will most surely suffer

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[15]The Attorney General appears to recognize this established principle of First Amendment jurisprudence. (*See* Defs.' Mem. In Supp. at 21-22 n. 6.)

those harms that the Permanent Injunction specifically endeavors to prevent. Defendants will continue to violate Plaintiffs' rights, as evidenced by their unwillingness to comply with the court's Permanent Injunction, or, for that matter, with Supreme Court and Eleventh Circuit precedent detailing proscribed activity. Despite Defendants': (1) admission that they are "not challenging the court's March 12, 1997 Memorandum Opinion, the factual record in this matter, or thirty years of controlling precedent," (Defs.' Reply at 2); (2) admission that "educators within Alabama's public schools [do not] have the right to subject students to unwanted religious indoctrination," (Defs.' Reply at 7); and (3) recognition of the clear holding of the Eleventh Circuit in *Jager,* where, in the Attorney General's own words, "the court struck down a school district practice of authorizing and organizing invocations to be given prior to public high school football games," (Defs.' Reply at 9 (citing *Jager,* 862 F.2d 824 (11th Cir.1989)), Defendants' *actions* indicate the contrary.

Two Declarations filed by the Plaintiffs on November 24, 1997,[16] to which the Defendants have notably failed to

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[16]The Declaration of Susan Jane Neely was filed November 24, 1997. On the same date, Plaintiffs filed their "Supplemental Opposition To 'Defendants' Motion to Stay,' " which contained the

respond, allege that the following occurred at a November 7, 1997 Sylvania High School football game:[17]

> 1. At about 7:00 p.m., a voice came over the P.A. The voice said there was someone there who had a special message for us. A second voice told us that a recent ruling had banned prayer in school. He said that they wanted us to help them send a message to the federal government and the rest of the country. This voice also said that he had the full support of Fob James, the Governor of Alabama.
>
> 2. All of the students were asked to go down to the football field, join hands, and form a circle. The stands cleared, as children from probably kindergarten up to twelfth grade made their way to the field. The circle stretched the width and length of the field, and consisted of students, band members, and cheerleaders. Then a man, middle-aged, wearing glasses, and on crutches because he

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hand-written statement of John Woodfin. Woodfin's typed and executed Declaration was filed December 5, 1997.

[17] Sylvania High School is one of the public schools located in DeKalb County, Alabama. The court's Permanent Injunction was issued October 29, 1997; the described activities occurred subsequent to, and in specific defiance of, the injunction.

> only had one leg, walked to the middle of the circle. He told all of the children to get down on their knees and raise their hands to heaven. He told them to raise their hands up high because there might be someone there who needed to see this. Next, he said that they were going to pray to their god. There was a brief moment of silence, and then the man led these students in prayer, the Lord's Prayer.

(*See* Neely Decl. ¶ ¶ 1, 2; *see also* Woodfin Decl. (describing same activity).) In addition, Gary Carlyle, Principal of Sylvania High School, wrote letters to both the Montgomery Advertiser and the Birmingham News that, at best, evidence misunderstanding of the terms of the Permanent Injunction, and at worse, when read in conjunction with the activities described in the Neely and Woodfin Declarations, evidence deliberate defiance. (*See* Pls.' Supplemental Opp'n, Exs. A, A-1.)

Moreover, on November 4, 1997, the Governor of Alabama--a Party to this action--issued a Statement regarding the court's Permanent Injunction. In this Statement, the Governor asserted that the children of the nation's founders "had the benefit of prayer in school," and after reiterating his desire that this court decline to follow United States Supreme Court precedent and instead follow

the Governor's interpretation of the United States Constitution, stated: "I will resist Judge DeMent's order by every legal and *political* means with every ounce of strength I possess."[18] (*See* Pls.' November 6, 1997 Mot. To Enjoin Proceedings in the Etowah County Circuit Ct., Ex. B (emphasis added).)

Based on these explicit and implicit indicia of noncompliance and purported and actual defiance of the law, as well as the myriad media reports that have been called to the court's attention, of which the court takes judicial notice, but on which the court does not rest its findings, it is clear that DeKalb County has allowed prayer at a high school football game in contravention of *Jager* and in specific defiance of the Permanent Injunction, and

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[18]For an extensive overview of the Governor's unique interpretation of the United States Constitution and his misguided opinion as to why lower federal courts are not bound by Supreme Court precedent, see the thirty-four page June 1997 letter from Governor James to the court. In addition to the record, the text of the letter may be viewed, as of December 15, 1997, via the Internet at <http://alaweb.asc.edu/govoff.html>. *See also* Fob James, Jr., *DeMent Followed High Court Deceit,* Birmingham News, December 7, 1997, at 1C.

It is indeed ironic, as Plaintiffs note, that Governor James "simultaneously contend[s] that the Court has no jurisdiction over the first amendment and then support[s] a stay of the Court's injunction on the ground that it infringes on students' first amendment rights...." (Pls.' Reply at 21-22.)

that the state chief-executive has promised political defiance.[19] It is clear that absent the Permanent Injunction remaining in effect, constitutional violations will continue, as indeed they *have* continued. Consequently, Plaintiffs have and will continue to suffer significant harms.

Contrary to majoritarian wishes, the State of Alabama cannot establish an official religion, either explicitly or implicitly, and officially-sanctioned religious activity in public schools can and must be prohibited to protect the rights of *all* of the citizens of Alabama.[20] On balance, the

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[19] The court has no qualms regarding the Governor's promise of *legal* resistance to the court's Orders, and indeed encourages the pursuance of an appeal. Such is the proper procedure for addressing and resolving purported discrepancies in court orders.

[20] The court suspects that if the Permanent Injunction enjoined non-majoritarian religious, or for that matter atheist or agnostic, beliefs and practices from being forced on school-children in DeKalb County, certain state officials would be first in line to seek enforcement of the court's Permanent Injunction. Such religious prejudice is one of the reasons our forefathers left England for America, and one of the reasons the First Amendment prohibits state-established religion. (*See* November 1997 Supplemental Op. and Order at 60-61 n. 54); *see also Engel*, 370 U.S. at 432. "The right to be free from state-established religion lies at the heart of the concept of 'freedom of religion' embodied in the First Amendment." (November 1997 Supplemental Op. and Order at 61 n. 54 (citing *Lee*, 505 U.S. at 591).) "The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority." *Wallace*, 472 U.S. at 60.

court finds it more likely that Plaintiffs, and other citizens, will be substantially injured by a stay of the Permanent Injunction than that Defendants will suffer irreparable harm as a result of the enforcement of the Permanent Injunction. Accordingly, the court finds that *Hilton* 's second and third factors cut against the Defendants and that *Hilton* 's public interest factor favors denial of the Motion To Stay, as well.

B. Interpretation Of The Permanent Injunction

The Defendants contend that the provisions of the Permanent Injunction at issue are "*facially* unconstitutional," (Defs.' Reply at 2 (emphasis in original)), and that "facial challenges to government enactments must be decided by reference to the contents of the restrictive language in question." (Defs.' Reply at 5.) Under the Attorney General's analysis, the court must look only to the language of the Permanent Injunction itself (on its face) in determining whether it passes constitutional muster or whether the provisions are vague and overbroad, as Defendants contend. (*See generally* Defs.' Reply at 2-6.) When so read, Defendants argue, "[t]hese provisions ... are *facially* unconstitutional, without regard to this Court's previous Orders or the factual basis from which this case arose." (Defs.' Reply at 2 (emphasis in

original).)[22]

Plaintiffs counter that the Defendants not only ignore the plain language of the Permanent Injunction, (Pls.' Opp'n at 10), but that the correct " 'inquiry should be whether the parties subject to the injunction understood their obligations under the order.' " (Pls.' Opp'n at 6 (quoting *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 978-79 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187, 93 L. Ed. 2d 120 (1986)).) Plaintiffs urge a reading of the Permanent Injunction in context, and contend that when so read, the "proscriptions are all specific and under the totality of the circumstances give DeKalb County an extremely clear understanding of the conduct that is proscribed." (Pls.' Opp'n at 7.)

In contrast to Defendants' argument that only the face

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[22]Interestingly, the Attorney General also states that he "does not dispute Plaintiffs' contentions that the Permanent Injunction should be read in light of this Court's previous rulings." (Defs.' Reply at 3.) The Attorney General then takes the position that "the Permanent Injunction is *inconsistent* with this Court's previous rulings and controlling Supreme Court precedent. For these reasons, Defendants believe that this Court must stay those provisions of the Permanent Injunction which were specified in Defendants [sic] Motion for Partial Stay." (*Id.*) Although not clear, the Attorney General appears to be arguing that the challenged provisions of the Permanent Injunction are unconstitutional on their face, *or*, when read in conjunction with the court's previous Orders, are inconsistent with those Orders, and thus unconstitutional.

of the Permanent Injunction should be read in construing its terms, the Eleventh Circuit noted in *Combs* that:

> A court may also disregard [a] defect [in an injunction] *if it is clear from the totality of the language in the various documents that [those enjoined] understood their obligations under the injunction. United States v. Goehring,* 742 F.2d 1323, 1324 (11th Cir.1984) (*per curiam*) (Rule 65(d) not specifically invoked, but contempt order upheld that incorporated earlier order because later order "contains sufficient findings of fact and conclusions of law for this court to perform its proper function and for the appellant to clearly understand the basis for the contempt order.")

Combs, 785 F.2d at 978 (emphasis added). *See also Lucero v. Chadwick,* 121 F.3d 591 (11th Cir.1991) (citing *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994))(interpreting injunction in light of *the record* before the court); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)(reviewing the *facts in the record* before the court in analyzing the remedial nature of an injunction). Notably, the Attorney General fails to address or apply these holdings. The court finds that when read in conjunction with the court's other Orders, or even when

read facially, the Parties enjoined understand their obligations under the Permanent Injunction, and except as noted, *infra,* the provisions of the Permanent Injunction challenged by the Attorney General are constitutionally sound, are not vague and overbroad, and are in conformance with standing Supreme Court and Eleventh Circuit precedent.

In contrast to disagreeing about whether the Permanent Injunction, as a whole, should be read standing alone or in conjunction with other pleadings, the Parties agree that internally, "the Injunction must clearly and sufficiently delineate permissible and impermissible conduct." (Defs.' Reply at 9; Pls.' Opp'n at 6 ("The parties being enjoined have the right to know what activities are prohibited").) What is required is "the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed." *United States v. Kaun,* 827 F.2d 1144, 1153 (7th Cir.1987); *see also Howard Johnson Co., Inc. v. Khimani,* 892 F.2d 1512, 1516 (11th Cir.1990) (utilizing "reasonable person" standard in interpreting provision of a district court's permanent injunction and upholding finding of contempt); *Fed. R. Civ. P.* 65(d) (injunctions should "describe in reasonable detail ... the act or acts sought to be

restrained"); (Defs.' Mem. In Supp. at 5 (citing to *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) for the correlative principle that "a statute is void if *persons of common intelligence* must necessarily guess at its meaning and differ as to its application") (emphasis added)). Rule 65 is not to be applied strictly; the inquiry is whether the "parties subject to the injunctive order understood their obligations under the order." *Williams v. City of Dothan, Ala.*, 818 F.2d 755, 761 (11th Cir.1987) (citing *Combs*, 785 F.2d at 978-79).

The Attorney General asserts that "school administrators all across the state are questioning the meaning of this Court's Permanent Injunction." (Defs.' Reply at 3 n. 2.) This assertion is unsubstantiated by any supportive filings, and noticeably fails to address the question of whether the *DeKalb County Board of Education and its individual members* understand its/their obligations under the Permanent Injunction.[23] In contrast

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[23] It is indeed ironic that the Attorney General claims state-wide mass confusion in one forum--this court, but then states that the Permanent Injunction applies only to DeKalb County in another--the media. (*See* Attachment B, December 8, 1997 Press Release from the Office Of The Attorney General ("AG December 8, 1997 Press Release") (stating that "many people in Alabama mistakenly believe the recent federal injunction strictly regulates religious expression in every school in the state, when in fact, these prohibitions only apply to the DeKalb County school system"); *see also*, Pls.' Add.

to the Attorney General's unsupported, self-serving assertion, the DeKalb County Board of Education ("School Board"), *the entity for which the Attorney General purports to speak,* has submitted its "Report to Court of Counsel of DeKalb County Board of Education, et al." In that document, the School Board, individually and acting as a School Board, and the Superintendent, acting through counsel, delineated their efforts "to comply with all open orders of this court in good faith." (DeKalb Sch. Bd. Report To Ct. at 1.) Counsel for the School Board indicated that the following activities had been undertaken pursuant to the court's previous Orders and the court's Permanent Injunction:

(1) A September 30, 1997 in-service for principals, assistant principals and certain administrative personnel of the DeKalb County School System. (*Id.*)

(2) Distribution, at the September 30, 1997 in-service, of a memorandum, composed by School Board legal counsel, explaining the court's Orders and including a copy of the court's March 12, 1997 Memorandum Opinion and Order. (*Id.* at 2.)

(3) The distribution of a memorandum concerning "Student Prayer *en mass* During Lunch" to all principals

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Evid.)

and other interested persons in the DeKalb County School System on October 2, 1997. (*Id.*)

(4) The mailing of information to all principals, teachers and administrative personnel concerning questions involving religious activities in school on October 21, 1997. (*Id.*)

(5) Submission of a memorandum concerning "Religion in Schools" on October 24, 1997. (*Id.*)

(6) Distribution of documents entitled "Outline of Permanent Injunction of October 29, 1997, What the Board of Education Must Do," and "Outline of Permanent Injunction of October 29, 1997, What We Can and Can't Do" across the DeKalb County School System and to any interested citizen on October 29, 1997. (*Id.* at 5-6.)

(7) Distribution of a position paper or November 5, 1997. (*Id.* at 6.)

Additionally, the Report indicates that the School Board and the Superintendent have undertaken the following in compliance with the Permanent Injunction:

October 30--Memo to Superintendent outlining proposed in-service for principals.

October 31--Principal's in-service meeting. Copies of the following given to each principal:

Permanent Injunction

Timeline of Major Required Activities

Riley Letter

Outline of Permanent Injunction

Copy of Alabama Code 16-1-20.3

November 4--Letter to Gideon's International with copy of Permanent Injunction attached.

November 4--Memo outlining conversation with Mr. Jay Kaiman, Anti-defamation League.

November 6--Memo to Superintendent outlining proposed meeting with local Gideons.

November 8--Meeting with local Gideons. Copies of Permanent Injunction distributed.

November 10--Notification of Permanent Injunction to all teachers.

November 10--Meeting with Association Teacher Representatives, DeKalb County Education Association.

November 12--Memo concerning proposed meeting with Assistant Principals.

November 14--Memo outlining discussion points with Charles Haynes, First Amendment Center.

November 14--Memo to all school [sic] asking for names and addresses of all PTO officers.

November 18--Letter to Plaintiff's [sic] Attorney proposing candidates for monitor and copy of "Finding Common Ground" for preview.

November 24--Fax communication from First

Amendment Center.

November 25--Board of Education approves policy "Distribution of Literature--Student Rights and Protection". [sic]

November 25--Copy of proposed policy mailed to Plaintiff's [sic] Attorney.

(DeKalb Sch. Bd. Report To Ct. at 3-4.)[24]

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[24] The reporting Defendants further informed the court that "substantial pressure has been exerted toward persons attempting to comply with the orders of this court. The defendants have experienced great criticism regarding their position." (DeKalb Sch. Bd. Report To Ct. at 4.) In addition to copies of the distributed documents outlined above, copies of representative articles, editorials, and letters published since September 30, 1997 for and against the position of the reporting Defendants were attached. (*Id.*)

The court notes the difficult position in which some enjoined Defendants are placed by the provisions of the court's Permanent Injunction. Nevertheless, appointment or election to public office does not justify imposition of personal or political views contrary to established law. There is no doubt that some of the criticism is heightened by political agitation. But, the DeKalb School Board and its individual members would not have found themselves "experienc[ing] great criticism regarding their position" if they had complied with long-standing legal precedent from the beginning. While the court is sympathetic to Defendants' situation, it is, ultimately, one of their own making.

The court does, however, recognize and specifically command the School Board, its Superintendent, and their counsel for their good faith efforts to comply with the Orders of the court. Apart from the November 7, 1997 activities at a Sylvania High School football game, *which greatly concern the court,* and which should also greatly concern the School Board,

To ensure that enjoined parties receive adequate notice of the precise conduct that is prohibited, Rule 65 requires that an injunction be specific in its terms and describe in reasonable detail the act or acts enjoined. *Fed. R. Civ. P.* 65(d); *Alabama Nursing Home Association v. Harris,* 617 F.2d 385 (5th Cir.1980).[25] In reading the terms of an injunction, the *Harris* court noted that "[a]n injunction does not prohibit those acts that are not within its terms as *reasonably construed.*" *Harris,* 617 F.2d at 388. In *Schering Corp. v. Illinois Antibiotics Co.,* 62 F.3d 903 (7th Cir.1995), *reh'g denied* (Sept. 12, 1995), the Seventh

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a cursory review of the December 4, 1997 Report To Court, along with its attachments, evidence a concerted effort to not only rectify, but to educate, inform, and to obey the law, like it or not. As counsel for the School Board noted in an October 21, 1997 memorandum to DeKalb County School System principals, teachers, and administrative personnel addressing questions concerning religious activity in school: "The school prayer case is bleeding our educational system here in DeKalb County of financial resources we desperately need. Our teachers need to recognize this fact and govern themselves accordingly.... *If you are not running for public office, or have some other hidden agenda, please become part of the solution and don't become part of the problem.*" (DeKalb Sch. Bd. Report To Ct., October 21, 1997 Mem. at 7-8 (emphasis added).)

[24] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Circuit articulated why a *reasonable* construction is necessary: "[T]he rule of strict construction of injunctions should not be pressed to a dryly logical extreme. If narrow literalism is the rule of interpretation, injunctions will spring loopholes ... and parties in whose favor injunctions run will be inundating courts with requests for modification in an effort to plug the loopholes." *Id.* at 906. Equally apparent is that unreasonable constructions and "narrow literalism" will lead to precisely the type of hypothetical "loopholes" offered by the Attorney General as examples of the Permanent Injunction's infirmity. The terms of the court's Permanent Injunction must be read reasonably, logically, and in their entirety; not in the selective splicing of words and phrases that inundate the Attorney General's Motion and Memorandum In Support thereof. [24]

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[24] The Attorney General appears to recognize the basic maxim that particular words and phrases in any judicial order or legislative enactment should ordinarily be read logically and consistently with the other words and phrases in the same sentence, paragraph, and/or Order, as applicable. In Defendants' Reply, the Attorney General cites *United States v. Kaun,* 827 F.2d 1144 (7th Cir.1987) "for the principle that the injunction should be viewed under a totality of circumstances through the eyes of a reasonable person." (Defs.' Reply at 4.)

Nevertheless, as Plaintiffs note, in challenging provisions of the Permanent Injunction as vague and overbroad, the Attorney General's "examples are themselves vague, being spectres intended

Following, is a restatement of the challenged provisions of the Permanent Injunction followed by a summarization of the Attorney General's objections. Except for the court's analysis under section 6(e), the court's analysis of the Attorney General's objections follow this restatement and summarization.

1. *Section 6(a)*

In its entirety, section 6(a) of the court's Permanent Injunction reads as follows:

> (a) *Regarding Classroom Activities and Instructional Settings.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and

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to induce fear and horror, rather than concrete factual situations." (Pls.' Opp'n at 9.) Certainly the majority of the Attorney General's "narrow literalism" is not in keeping with *Harris* ' admonition to reasonably construe the terms of an injunction or with the Attorney General's own reading of *Kaun.*

discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non-religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(*See* Permanent Inj. at 3-4 (emphasis in original).) Not only a reasonable reading, but even a narrowly literal reading, discloses that what this provision prohibits is:

(1) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* vocal prayer.

(2) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* Bible and religious devotional or scriptural readings.

(3) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* distribution of religious materials, texts, or announcements.

(4) *School organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to* discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

Clearly, this provision enjoins *school organized,* or *officially sanctioned* religious activity.[25] As other provisions of the Permanent Injunction clearly articulate, **students are free to engage in any or all of these activities as long as they are not *school organized* or**

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[25]The Attorney General admits that he is not challenging "*the Permanent Injunction's proscriptions with regard to school sponsored, officially organized religious activity,*" and that "[t]his law is settled." (Defs.' Reply at 10 (emphasis in original).) Nevertheless, the Attorney General then proceeds to challenge section 6(a), which a literal reading discloses merely enjoins "*school organized* or *officially sanctioned* religious activity." (Permanent Inj. at 3.)

officially sanctioned. For example, as the court took pains to note, the Permanent Injunction does not proscribe: (1) the educational use of religious texts in the classroom to the extent that the material is presented in an objective and academic manner; (2) students' voluntary expression of their own religious beliefs in the form of various school assignments as applicable and as academically appropriate; (3) the display of religious symbols or clothing bearing religious messages consistent with a school's applicable time, place and manner restrictions; (4) secondary-school students from engaging in religious activity during noninstructional time consistent with the Equal Access Act; (5) secondary-school students from "quietly engag[ing] in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves" (Permanent Inj. at 4);[26]

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[26] The Attorney General particularly objects to the word "quietly" and the phrase "so long as it does not unduly call attention thereto" in one paragraph of section 6(a) as unduly vague and in violation of *Tinker v. Des Moines School District,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). (Defs.' Mem. In Supp. at 8.) Specifically, *Tinker* provides that proscriptions be tailored to "the requirements of appropriate discipline in the operation of the school." *Id.* at 509.

In context, these words are part of section 6(a)'s proscription of school organized or officially sanctioned religious activity. They

are stated in the fourth of four paragraphs detailing what the Permanent Injunction *does not* proscribe. They are part of the court's notation that "[t]his PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to *quietly* engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*" (Permanent Inj. at 4 (italics in original) (underlining added).)

Consistent with *Tinker*, and with the court's emphasis on applying identical time, place, and manner restrictions to religious and other types of conduct, a more detailed enunciation perhaps could read: "This PERMANENT INJUNCTION does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act ..., or to engage in religious activity during noninstructional times *so long as it does not interfere with the rights of other students, is consistent with the school's applicable time, place, and manner restrictions regarding any other type of conduct during noninstructional times, and such policy is enforced consistently, regardless of the content of the conduct being proscribed.*"

The court finds that the words underlined above may not be sufficiently narrowly tailored, and thus finds that the Motion To Stay as to these twelve words of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction is due to be granted. *In staying the word "quietly," and the phrase "so long as it does not unduly call attention thereto and," however, the court notes that it is* ***merely clarifying what students have always been allowed to do consistent with the Permanent Injunction and established First Amendment law: engage in religious activity that is not officially sanctioned or coerced and that does not infringe on the rights of others.*** *See Tinker*, 393 U.S. at 513.

The Parties are put on notice, however, that inconsistent

and (6) student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.[27] Not only a reasonable, but a literal reading of the terms of section 6(a) shows a clear delineation between "*school organized* or *officially sanctioned* religious activity," (Permanent Inj. at 3), and non-school organized, non-officially sanctioned

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enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion over other religions or non-religion. The First Amendment requires the government to remain strictly neutral among religions and between religion and non-religion. *Jager,* 862 F.2d at 828. Further, as the *Tinker* court noted: **"[C]onduct by the student, in class or out of class, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."** *Tinker,* 393 U.S. at 513 (emphasis added).

[27] Here, the Permanent Injunction refers readers to section 6(e), where the court requires DeKalb County to promulgate "a written policy of general application for all DeKalb County public schools ... to govern such distributions in terms of time, place, and manner restrictions." (Permanent Inj. at 9.) In 6(e), the court reemphasizes that the Permanent Injunction "DOES NOT prohibit student distribution of religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distribution of nonreligious materials." (Permanent Inj. at 10.)

student conduct.

Nevertheless, the Attorney General contends that under his reading of section 6(a), the following could be prohibited:

(1) Discussions in a history class dealing with the contributions of historical figures to modern day society. (Defs.' Mem. In Supp. at 5.)

(2) Discussions of the meaning or origin of certain state-recognized holidays. (*Id.* at 1, 6.)

(3) Bible reading and discussion among students in a study hall or homeroom period, even if not disruptive of the classroom setting. (*Id.;* Defs.' Reply at 11.)

(4) Student-initiated Bible Club meetings on campus after school hours. (*Id.* at 7.)

(5) Students praying before lunch. (Defs.' Reply at 12.)

(6) A student giving a flyer to another student about an event at his church or youth group.

2. *Section 6(b)*

In its entirety, section 6(b) of the court's Permanent Injunction reads as follows:

> (b) *Regarding Graduation or Commencement Exercises.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing,

ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[35] [sic] provided

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[35] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court

that such expression is not encouraged in any way by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any commencement program at any DeKalb County school. The Defendants, and each of them, are specifically

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to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION. (Permanent Injunction at 5 n. 1.)

> PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services. Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(*See* Permanent Inj. at 4-6 (emphasis in original).)

Prohibited under section 6(b) are:

(1) Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises.

(2) Such activity in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

(3) The listing, announcing, or memorializing of any religious activity or message on any commencement program at any DeKalb County school.

(4) The printing of baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools.

(5) The organization or sponsorship of any baccalaureate event by school officials.

(6) School officials encouraging or discouraging, directly or indirectly, a student's attendance at baccalaureate services.

(7) School officials conditioning a student's attendance at commencement exercises on attendance at baccalaureate events.

Prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises are prohibited regardless of whether offered by clergy, a student, administrator, teacher, school employee, or nonschool person, regardless of how denominated, and regardless of whether a public-address system is used. When violations occur, school officials are directed to take "appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 6.)

Again, the court took pains to note what section 6(b) does not proscribe:

(1) A brief personal expression by a student which contains religious references during a commencement exercise or a student address that is not encouraged by school officials and that does not invite audience

participation or response.[36]

The Attorney General contends that section 6(b) is vague, (Defs.' Mem. In Supp. at 9; Defs.' Reply at 12), and under his reading of section 6(b), a student valedictorian could be prohibited from explaining why Mother Teresa was an inspiration for his or her success. (Defs.' Reply at 12.) The Attorney General also contends that when he reads section 6(b) literally, it: (1) could require the school to "police all in attendance" (Defs.' Mem. In Supp. at 9); (2) discriminates against private religious speech based on its content and viewpoint (*Id.* at 9-11); (3) would lead to school officials censoring a student graduation speaker's thoughts before a speech was given (Defs.' Mem. In Supp. at 2); (4) violates the Establishment Clause by requiring state entanglement with religion (*Id.* at 11-12); and (5) violates Supreme Court and

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[36] The court specifically noted that a student may express thanks to Deity for academic success and emphasized that the court was not suggesting that this was the only such reference that would be permissible. The court's example was meant to be "illustrative only," and articulated to "assist school officials in complying with the terms of this PERMANENT INJUNCTION." (Permanent Inj. at 5 n. 1 (emphasis in original).)

The court also explained that the permissible "personal expression by a student ... may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity." (Permanent Inj. at 5-6.)

Eleventh Circuit precedent. (*Id.* at 12-14.)

3. *Section 6(c)*

In its entirety, section 6(c) of the court's Permanent Injunction reads as follows:

> (c) *Regarding Use of Public-Address Systems for Religious Addresses.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and nonschool persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school

> disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities.

(Permanent Inj. at 6-7 (emphasis in original).)

Activity prohibited under section 6(c) includes:

(1) The delivery of prayers, religious or devotional messages (including scriptural readings) over any public-address system during the instructional day, including: the home room period, the delivery of daily announcements, and in connection with any school-sponsored events.

When violations by students occur, school officials are directed to "take appropriate disciplinary action as they would for any violation of school disciplinary rules." (Permanent Inj. at 7.) The court specifically noted that

students could make announcements over a school public-address system "regarding meetings of noncurricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of nonreligious activities." (Permanent Inj. at 7.)

The Attorney General contends that 6(c)'s restrictions regarding the use of school public address systems for religious addresses are unconstitutional because they are vague and overbroad. (Defs.' Mem. In Supp. at 14-15.) Under his reading of this provision: (1) "Muhammad Ali would not be able to address the student body and share his life's [sic] story;" and (2) "school officials would be required to censor all student speeches which occur as part of any school assembly." (Defs.' Mem. In Supp. at 2.)

4. *Section 6(d)*

In its entirety, section 6(d) of the court's Permanent Injunction reads as follows:

> (d) *Regarding School-Sponsored Assemblies and Events.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in,

or permitting, prayers, Biblical and scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored or school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or noncompulsory, and regardless of whether the speaker/presenter is a student, school official, or nonschool person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071 *et seq.*, which, while according students expressive rights, does not allow school officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(Permanent Inj. at 7-8 (emphasis in original).)

Section 6(d) prohibits:

(1) Prayers, Biblical and scriptural readings, and other

presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events, regardless of whether the activity takes place during instructional time, whether attendance is compulsory or noncompulsory, and regardless of the speaker.

The court noted that the Permanent Injunction did not interfere with the Equal Access Act, and specifically noted that the Act accords students expressive rights but "does not allow officials to provide special privileges to noncurricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs." (Permanent Inj. at 8.)

Section 6(d) is challenged because the Attorney General reads its provisions to be "grossly overbroad" and "literally would prevent: (1) a parent from praying silently in the stands at a football game" (Defs.' Reply at 13); (2) "a group of football players gathering together before a school game to pray" (Defs.' Mem. In Supp. at 15-16); (3) "a football player who scores a touchdown during a game from kneeling down in the endzone to pray" (*Id.* at 16); and (4) the singing of "Silent Night" and other songs at a school Christmas play or concert. (*Id.*)[37]

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[37] After a detailed search of the Permanent Injunction, the March 1997 Memorandum Opinion and Order, the November 1997

5. *Section 6(e)*

In its entirety, section 6(e) of the court's Permanent Injunction reads as follows:

> (e) *Regarding Distribution of Bibles and Other Religious Tracts.* The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or nonschool persons to enter any classroom or any school property where students are assembled, for the purpose of distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on

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Memorandum Opinion and Order, and the November 1997 Supplemental Opinion and Order, the court can find no reference to a ban on the singing of "Silent Night" or other songs at a school Christmas play or concert. *Any* school sponsored or officially sanctioned activity must simply comport with standing Supreme Court and Eleventh Circuit law, as well as the terms of the court's Permanent Injunction. Clearly read, section 6(d) prohibits such activities that are *primarily* of a "religious nature." As section 6(a) notes, the expression of religious material in an objective, academically appropriate manner is clearly permissible. And, as section 6(c) notes, "religious or devotional" messages may not be delivered over a public address system during the instructional day. Section 6(d) merely proscribes the delivery of such *officially sanctioned, content-focused messages in school-sponsored assemblies and events.*

school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from nonschool persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place, and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall

list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately,* that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding

school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

> In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.
>
> This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.

(Permanent Inj. at 8-11 (emphasis in original).)

The Attorney General challenges section 6(e), contending that it "violates the Gideon's right to distribute religious literature in a traditional public forum without a compelling state interest." (Defs.' Mem. in Supp. at 17; *see also* Defs.' Reply at 16-21.) Plaintiffs contend that the Attorney General does not have standing "to challenge the alleged chilling of the Gideons' alleged free-speech rights." (Pls.' Opp'n at 30.) This, Plaintiffs argue, "is the Gideons' burden." (*Id.*) The Attorney General counters that he does have standing because: (1) "the Attorney General has both a legal right and an obligation to defend the constitutional rights of the citizens of Alabama" (Defs.'

Reply at 14); (2) "the Attorney General has sworn, under oath, to abide by the laws of the State of Alabama and the United States, and at all times to secure their enforcement" (*Id.* at 15); (3) as "a named party to this lawsuit ... the Attorney General has every right to raise vagueness/overbreadth issues which arise in the course of this litigation" (*Id.*); and (4) the Attorney General represents the State and DeKalb County Boards of Education, the Permanent Injunction requires these Parties to take steps which the Attorney General contends "will chill the free speech rights of a party," and "[c]onsequently, the Attorney General has standing, on behalf of his clients, and himself individually, to raise the Gideon's free speech rights." (*Id.*)

Although the court has doubts regarding the Attorney General's ability to speak for the Gideons, *see Lucero,* 121 F.3d at 605 n. 25 (quoting *Madsen,* 512 U.S. at 775-77 ("[Defendants] themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties")), regardless of the standing issue, a reasonable and literal reading clearly shows that section 6(e) merely prohibits:

(1) School officials or nonschool persons from entering any school property where students are assembled, for the purpose of distributing Gideon Bibles or other

religious tracts, literature, or paraphernalia to students *on school property during the school day* or at any *school sponsored* event.

(2) The distribution of Gideon Bibles, religious tracts, literature, or paraphernalia by placement in a common area *absent* a "formal, written policy ... governing distribution of materials from nonschool persons in DeKalb County public schools generally." (Permanent Inj. at 8-9 (emphasis added).)

As noted above, section 6(e) specifically emphasizes that the Permanent Injunction "DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials." (Permanent Inj. at 11 (emphasis in original).) In its November 1997 Supplemental Opinion and Order, the court also stated that:

> The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the 'gap' this leaves in the

> delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

(November 1997 Supp. Op. and Order at 51-52.)

Section 6(e) also requires the following:

(1) A promulgated, written policy applicable in all DeKalb County public schools governing distributions in terms of time, place, and manner restrictions.

(2) Publication and distribution of a written copy of such policy with instructions that it shall be followed to each school principal, with instructions that it shall be followed in each DeKalb County public school.

(3) That a copy of the Permanent Injunction be provided to the Gideons.

(4) That the Gideons be informed in writing "that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the

school ... *if* students who are approached for distribution are still situated on or boarding school property...." (Permanent Inj. at 10 (emphasis in original).)

(5) That the Gideons be informed additionally, that "they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property...." (Permanent Inj. at 10.)[38]

(6) That the same steps be followed "for any nonschool group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia." (*Id.*)

(7) That school officials "take action to cause ... violative conduct to cease immediately" in the event of violations of the injunction and in the event of "aggressive or harassing behavior of the sort proscribed herein." (*Id.*)

Regardless of the standing issue, on November 18, 1997, the Superintendent of Education for the DeKalb

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[38]The court specifically noted that "still situated on school property" meant, for example, while students were ... "standing in line in the school parking lot to board the bus and still under school officials' general supervision and protection, or boarding the public school bus." (Permanent Inj. at 10.)

County Board of Education provided to the court a copy of a November 4, 1997 correspondence sent to the Gideons International. The Superintendent informed the court that, in addition to sending such correspondence to the Gideons International, he had met with local leaders of the Gideons International "to present the injunction and answer questions." (November 18, 1997 Correspondence from Superintendent of Educ. to the court, Attachment A.)[39] On November 25, 1997, Plaintiffs filed a pleading indicating the DeKalb County Board of Education's compliance with section 6(e). The substance of the correspondence from the DeKalb County Board of Education to the Gideons International reads as follows:

> Please find attached to this letter a copy of a permanent injunction issued by Judge Ira DeMent of the United States District Court for the Middle District of Alabama, Northern Division.
>
> Judge DeMent has ordered that you be provided with a copy of this injunction and that you be informed that students shall not be harassed with regard to acceptance or nonacceptance of any Gideon Bibles while Gideon representatives are

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[39] This information was also reported in the DeKalb School Board's December 4, 1997 Report To Court.

> situated on public property near the school, and that Gideons shall not throw or pass Gideon Bibles through the windows or doors of school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property.

(*See* November 4, 1997 Correspondence from DeKalb County Bd. of Educ. Superintendent of Educ. to the Gideons International, Pls.' Notice of Compliance, Ex. A.)

Further, on December 2, 1997, Plaintiffs filed their "Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." ("Pls.' Notice of No Objection"). Plaintiffs state that "they have confirmed in a conversation with DeKalb County counsel that the policy proposed ... as to distribution of nonschool materials was in fact adopted by the DeKalb County Board of Education last week." The policy reads as follows:

> **Distribution of Literature: Student Rights and Protection**
>
> The DeKalb County School Board of Education recognizes the right of students to distribute literature on public school property, subject to reasonable time, place and manner restrictions

> imposed by the school. Such restrictions should be reasonable and must apply evenly to all nonschool student distributed literature.
>
> DeKalb County schools may prohibit the distribution of literature that is obscene, defamatory, or disruptive of the educational environment.
>
> The DeKalb County Board of Education prohibits the distribution by DeKalb County school board employees and nonschool individuals of commercial, political, religious or promotional materials to students on public school property.

(Pls.' Notice of No Objection, Ex. A, proposed policy for literature distribution.)

Clearly, the DeKalb County Board of Education understood its obligations under section 6(e) of the Permanent Injunction. Not only did DeKalb County comply with those provisions addressing the Gideons International, it also complied with those provisions requiring the promulgation of a written policy governing the distribution of materials in DeKalb County schools. In correspondence dated November 25, 1997, the Superintendent of Education for DeKalb County stated that "[o]n Page 9 of the Permanent Injunction, provisions are made for a review and the listing of any objection within

ten days. I will wait for Court approval, and possible revision, before officially implementing this policy in DeKalb County Schools." (*Id.*) Based on the foregoing, the court finds that, without addressing the propriety of section 6(e), the substantive provisions therein have been substantially complied with, and any objections relating thereto are accordingly moot.

6. *Section 7*

In essence, section 7 of the Permanent Injunction requires the following:

(1) The distribution of the court's opinions and Permanent Injunction to school principals in DeKalb County with instructions that each principal inform faculty, staff and students that the court requires compliance. (Permanent Inj. at 12.)

(2) That in each DeKalb County public school, a copy of the Permanent Injunction be made available or posted in areas commonly utilized for communicating notices or information to both students and faculty until the Permanent Injunction expires. (*Id.*)

(3) That a copy of "The Riley Letter" and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law" remain available in each DeKalb County public school library until expiration of the Permanent Injunction. (*Id.*)

(4) That copies of the court's opinions and Permanent Injunction, together with a notice specifically articulated in the Permanent Injunction, be provided to groups organized for parental participation in school affairs at each DeKalb County public school. (*Id.* at 12-13.)

(5) That during the 1997-98 school year, Defendants conduct an in-service training session for faculty and administrators in DeKalb County public schools that is "reasonably designed to familiarize these school officials with the provisions of this Permanent Injunction, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities." (*Id.* at 13.)

(6) That Defendants direct all new faculty and administrators not present for the 1997-98 in-service training to acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session. (*Id.*)

(7) That the curricular material used for the in-service be the court's opinions in this matter, together with a

"program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor [for approval], with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections...." (*Id.* at 13-14.)

(8) That counsel for the School Board certify to the court on pre-determined dates each year, "that each school within the DeKalb County school system is in compliance with this Permanent Injunction." (*Id.* at 14.)

(9) That in conjunction with Plaintiffs' counsel, a monitor be nominated for the purpose of insuring compliance with the Permanent Injunction. (*Id.* at 15-16.)

(10) That the in-service session and monitor be paid for by the DeKalb County Board of Education. (*Id.* at 16.)

These enforcement provisions are challenged "[t]o the extent that section 7 requires school officials to enforce certain provisions of section 6." (Defs.' Mem. in Supp. at 22.) Section 7(e) is specifically challenged as vague because, according to the Attorney General, directing school officials to use a "program of religiously neutral, nonsectarian content," is not sufficiently clear. (*Id.*) Nevertheless, contrary to the Attorney General's purported failure to understand the requirements of section 7, the DeKalb County Board of Education and its members have made it patently clear that they understand the Permanent

Injunction's requirements.

In addition to the Report to the court, (examined *supra*), on December 2, 1997, Plaintiffs filed a pleading entitled "Notice Of Agreement With DeKalb County Board Of Education's Nominee As Monitor, Notice Of Agreement With DeKalb County Board Of Education's Selection Of Course Materials, And Notice Of No Objection To DeKalb County Board Of Education's Policy Regarding Distribution Of Materials By Nonschool Persons." These pleadings illustrate to the court the DeKalb School Board's ability to understand the terms of the Permanent Injunction. *The court finds the Attorney General's assertion that the School Board does not understand its obligations under the Permanent Injunction curious, especially in light of the DeKalb School Board's filings.* The Attorney General would be well advised to communicate more fully with his purported client(s) before making assertions on its behalf.

7. Refutation of the Attorney General's Hypotheticals

The Attorney General's selective interpretation of the words and phrases in the challenged provisions of the court's Permanent Injunction is a prime example of what Plaintiffs contend to be the injection of "political divisiveness into these proceedings," (Pls.' Opp'n at 4 n. 8), and one of the "spectres intended to induce fear and

horror" into the populace. (Pls.' Opp'n at 9.) The court has made patently clear in its Permanent Injunction, read reasonably and without "narrow literalism," and for that matter, in its other Orders, of which the Attorney General should have received copies, exactly what type of conduct is proscribed. The court has also taken pains to note what is permissible under current Supreme Court and Eleventh Circuit precedent. Although clear under a reasonable and logical reading, the Attorney General has adduced hypothetical situations as a means of challenging the Permanent Injunction. In their Opposition to Defendants' Motion To Stay, Plaintiffs responded factually, legally, and with specificity, to the Attorney General's hypotheticals. The court hereby adopts the pertinent provisions of Plaintiffs' pleading presented below:

> Only by ignoring the plain language of the injunction, the teachings of this Court's March 12 opinion, and the facts as presented by the parties and found by the Court can one reach such astounding conclusions. And, only by ignoring 30-odd years of precedent can one reach the conclusion that the Attorney General is likely to succeed on appeal. As this Court pointedly noted in its November 12, 1997 Supplemental Opinion and Order, "[t]his federal district court does not

judge it to be its province to adopt for Alabama" the case law of the Fifth Circuit, in the face of *Lee v. Weisman* and *Jager*, to name but two controlling cases. (*See* Supp. Op. at 42, Ex. A hereto.) Thus, the defendants' likelihood of success on appeal only exists if the Eleventh Circuit overrules *Jager*, a matter which this Court cannot prognosticate and which matter will shortly be in the hands of the only court that can preliminarily overrule or ignore it. *Jager* is now the law, and under *Jager*, the defendants have no substantial likelihood of prevailing on appeal.

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1. Students *can* read their Bibles during study hall [40]

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[40] There might indeed be a situation in which a student is prohibited from reading his or her Bible during study hall, but only if that activity is "school organized" or "officially sanctioned." An individual student reading his or her Bible in study hall, without direction to do so from the teacher or a school official, is not encompassed in the terms of the injunction. Nor, by the plain terms of the injunction, is a school official proscribed from instructing a student in, *e.g.*, a Bible as Literature class to do his or her homework, including assigned reading from the Bible. Finally, of course, the entire injunction must be read in context, not dissected to fit the Attorney General's purposes in one narrow phrase. Section 6(d) makes it clear that the Court does not contemplate enjoining the student sitting in study hall; it expressly refers to a "speaker/presenter." A "speaker/presenter" is not a student quietly reading the Bible in study hall, as common sense informs us.

The objection to the injunction as "vague" and "overbroad" purports to find that under these amorphous provisions, a student cannot read the Bible in study hall. As the Court was at pains to make clear in its March 1997 Memorandum Opinion, a copy of which was attached to the injunction, the Establishment Clause does not reach private student expression and activity. In its injunction, the Court similarly made it clear that only "school organized" or "officially sanctioned" religious activity falls within the scope of its prohibition.[41] What is "school organized" or "officially sanctioned" religious activity? According to the Court:

[W]hen a student advocates his or her religious beliefs in situations where the student's peers are unable to move about freely (and thereby avoid listening to speech they find disagreeable) and/or when the student's peers are unable to freely express themselves in response (because school officials are actively controlling a particular

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[41] In fact, the Court e ven emphasized, through the use of italics, that the phrase "religious activity" is to be modified by the phrases "school organized" and "officially sanctioned." (Injunction at 3.)

setting).[42]

The Court would distinguish the above-described situations from those periods during which students are "in school" or attending a school-event but school officials exercise minimal supervisory control and students are free to move about as they please. During these latter times, *e.g.*, in between classes or lunch (depending on the factual circumstances) the restrictions on students' free speech rights are limited; students should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than its content, disruptive (*e.g.*, it is loud, the speaker is aggressive etc.).

And, the Court clarified, "As long as students abide by a school's generally applicable rules and regulations, students should ordinarily" be permitted to engage in a wide variety of religious expression. The Court went on to provide an "exemplary" list only, one that was "by no means intended to be a complete statement of permssible [sic] religious expression by public school

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[33] Self-evidently, a student privately reading a Bible in study hall does not necessitate a "response" from anyone.

students." (Mem. Op. at 22-23 & nn. 16, 17.) When the speaking student's use of the school's facilities includes commandeering a captive audience or a school setting in which the speaker's schoolmates are unable to respond in kind, speech is "officially sanctioned" because the speaker is then using the machinery of the state for conveying the religious message to the captive audience. Thus, a student who obtains the permission of the school official who is monitoring the study hall and then leads his fellow study hall participants in a public Bible reading and prayer from which the dissenting students could not leave is on different constitutional ground than a student who whiles away the hour by silently reading Proverbs, instead of *Sassy* magazine, after completing his or her math assignment. The latter is engaging in that type of private religious activity which falls outside the reach of the Establishment Clause, while the former is not. The latter's conduct is not touched by the injunction, while the former's is prohibited. This portion of the injunction is in keeping with the requirements of the First Amendment. Public school officials are prohibited by the

Establishment Clause of the First Amendment to the United States Constitution from authorizing *anyone* --including students--to insert religious exercises into a *school* program. *Lee v. Weisman,* 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); *Abington School District v. Schempp,* 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); *Jager v. Douglas County Board of Education,* 862 F.2d 824 (11th Cir.), *cert. denied,* 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989); *Karen B. v. Treen,* 653 F.2d 897 (5th Cir.1981), *aff'd per curiam,* 455 U.S. 913, 102 S. Ct. 1267, 71 L. Ed. 2d 455 (1982). This law is nothing new, and it militates against granting a stay.

2. Students *are* permitted to discuss the meaning of Christmas and Easter

As already noted, the Court's order reaches only "school organized" or "school sponsored" religious activity, so a student's discussions with his or her friends over lunch or on the playground are not affected in any way by the injunction. As for in-classroom activity, the Court has made provision for those students who might wish to give a speech or presentation that includes their personal religious beliefs, including the meaning

of Christmas. In paragraph 6(a), the Court states: "This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework or artwork or other school assignments as applicable...." (Injunction at 4 (emphasis in original).) This certainly includes a discussion of "What Christmas means to me" or "The true meaning of Easter" offered in connection with a school assignment (such as an essay or a speech). A student may choose in such an academic context to proffer ideas expressive of his or her own religious beliefs, consistent with *Schempp* and with this Court's injunction.

Likewise, contrary to the Attorney General's hyperbolic fulminations, the injunction does not prohibit a history student's in-class remarks about "why Jesus contributed more than Einstein or Edison." (Mot. Partial Stay at 5.) Assuming that such a remark is an expression of religious belief,[43] such remarks clearly fall within the

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[34] It might be or it might not be. It is certainly possible that a student could believe that Jesus Christ is an important historical figure without believing that he is the Son of God, and presumably a great many Jewish believers, Muslims, Buddhists and agnostics could believe this. It could be, for example, that a Muslim student

above-articulated exception--the "voluntary expression of [students'] own religious beliefs in the form of ... school assignments." (Injunction at 4.)[44] If a teacher directs students to discuss the importance of various historical figures, a student's voluntary discussion of the importance of Jesus fulfills the terms of the assignment. This does not violate the terms of the injunction, does not violate the Constitution, and is not a reason to grant the motion to stay.

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or even an atheist student could believe that Jesus was a great teacher without believing in or expressing a belief in Jesus' divinity. It could be that a person of any religion or no religion could forcibly argue in the context of an academic assignment that measuring a calendar from the date of a crucifixion is *prima facie* evidence that the historical importance of Jesus outweighs that of the inventor of incandescent lighting. This speech would not necessarily be religious, and even if it were, it is not proscribed. The matter is neither here nor there, except to the extent it is in the Attorney General's head and his brief.

[44] Also, to the extent that "educational texts" were involved in this hypothetical history class, those texts can be specifically religious, as long as the books or documents are part of an objective or academic course of study. (Injunction at 3.) *See Schempp*, 374 U.S. at 225 ("It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment.").

3. Students *can* pray before lunch

The injunction does not reach private expressions of a student's faith, such as saying grace before meals. One particular pre-lunch "religious" behavior is prohibited: the "religiously based" harassment of Plaintiff Jesse Chandler by his fellow students at Fyffe School. (Injunction at 11.) According to the uncontroverted testimony of Michael Chandler in this case:

Fyffe School students are led to lunch every day and cannot leave the campus for lunch; the school has a closed-campus policy. In approximately October 1996, Jesse[45] began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief. Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's

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[45] Jesse Chandler, the minor-child plaintiff and son of Michael Chandler.

arrival, 'One, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive-audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

... I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara

Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

(Supp. Op. and Order at 21-22.). The Defendants, including Defendant Weldon Parrish, and DeKalb County official Danny Ashley, did not submit contrary testimony.

Moreover, this Court specifically stated that students at lunchtime, depending on the factual circumstances, "should be able to engage in sectarian, proselytizing, religious speech as long as it is not, for reasons other than content, disruptive (e.g., it is loud, the speaker is aggressive, etc.)." (Mem. Op. at 22 n.16.) 175 students ganging up on Jesse Chandler, if this is in fact "sectarian, proselytizing, religious speech," is also disruptive and aggressive. This Court's

proscription of that specific conduct does not extend to banning a student's saying of grace generally.

4. Students *can* distribute flyers about "youth group" activities to their fellow students

As is made absolutely clear in the injunction, students are NOT prohibited from "distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials ..." (Inj. at 4, 11.) In keeping with the policy of neutrality, students' distributions of tracts or invitations to church events are treated exactly like the distributions of non-religious materials and are subject to the school's time, place and manner restrictions. The First Amendment does not require anything more. This false objection is not a reason to grant the Attorney General's motion to stay.

5. A valedictorian *is not* prohibited from explaining the importance of Mother Teresa to her success in school

In the hypothetical offered by the Attorney General, a class valedictorian could not explain

the importance to her of Mother Teresa in her speech to the graduating class. (Mot. Partial Stay at 2.) The Attorney General complains that such a speech might be deemed a "devotional" and that school officials would be obligated to censor her speech before she gave it in order to prevent an infraction of the terms of the injunction.

The Attorney General has made a profound analytical error. Just as he assumes that all discussion or reference to Jesus is necessarily religious or proselytizing speech, he assumes that any discussion of Mother Teresa, merely because she is a religious figure, would be religious or have the purpose or effect of proselytizing. It is possible that, just as Jewish believers, Muslims and agnostics could believe that Jesus has been a shaping force in history without believing that he is the Son of God, persons could believe that Mother Teresa was a great helper of the poor without subscribing to her religious faith or religious example. Thus, speech about Mother Teresa is not necessarily religious speech.

Such a speech as the Attorney General contemplates is not a "devotional." The court's injunction is not issued in a vacuum; it is issued

in the factual context of DeKalb County. In DeKalb County, devotionals were expressly delivered over the public-address system, as all of the affidavits from employees at the Plainview School establish. They included Bible reading and prayers, and the DeKalb County affiants testified that the messages over the intercom were of "a devotional character, ... but not religious" even while admitting that they included Bible readings and prayer. (*See* Mem. Op. and Order, Nov. 12, 1997, at 10-12 (granting summary judgment to plaintiffs against DeKalb County on nonfacial challenges).) The Court made plain that it took a devotional to be religious. (*Id.* at 11.) The Court's injunction clearly contemplates that a devotional may is [sic] religious: "vocal prayer; Bible and religious devotional or scriptural readings" are proscribed by Section 6(a); prayer and "religious or devotional messages (including scriptural readings)" over the public-address system are proscribed by section 6(c); "Biblical and scriptural readings" at school-sponsored assemblies and events except where consistent with the Equal Access Act, are proscribed by Section 6(d). The Attorney General

may not pry one nubbin from the Court's injunction and pretend that it stands alone, without the context of the rest of the injunction and the factual context in which the injunction was rendered.

From a 40-page opinion on the facial validity of the statute in March 1997, over 50 pages of findings of fact and conclusions of law on November 12, 1997, a 24-page summary judgment opinion on November 12, 1997 which the Court stated was to be read concurrently with the findings of fact[46] –DeKalb County ought to know what is proscribed. *It does not matter if the other defendants who are not specifically enjoined as to DeKalb County practices understand the injunction or not.* An entire valediction on Mother Teresa is not proscribed; a prayer is. It is unimportant that the Attorney General purports not to know what a devotional is; it matters only that DeKalb County, which is bound by the provisions of the injunction,[47] knows what a

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[46] *See* Supp.Op. and Order, Nov. 12, 1997 n. 53.

[47] [Not adopted].

devotional is. In this case, devotionals have, by all the facts, consisted of prayer and Bible reading. Nowhere in the Complaint is Mother Teresa mentioned, nor have the DeKalb County defendants purported to offer testimony about Mother Teresa. Instead, as the Court noted in its November 12, 1997 summary judgment opinion, the DeKalb County defendants sought refuge as to their "devotionals" and "words of inspiration"--which by their own affidavits turn out to be Bible readings and prayer over the intercom--in the statute's protection, themselves denominating such devotionals "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Mem.Op., Nov. 12, 1997 at 10-11.)

Noting that the DeKalb County defendants had equated "words of inspiration" with "devotionals" in response to an interrogatory inquiring about a Bible reading at a D.A.R.E. assembly, and averring that the activity was alleged to be 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions' *by DeKalb County,* the Court expressly stated: "The court finds it reasonable to conclude that

mere 'words of inspiration' would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions in hopes of thereby insulating them from scrutiny." *The specific invocation of the statute would not be necessary for secular 'words of inspiration'....* (Mem. Op., Nov. 12, 1997, at 11.) (Emphasis added.)

In other words, *secular words of inspiration--as distinct from prayers and Bible readings* --are not prohibited by anything in the Court's injunction or in its opinions. *Secular presentations, including presentations drawing upon the examples of adults who have led righteous lives, are absolutely permissible.*[48]

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[39] A "devotional" camouflaged by an "inspirational" patina is clearly what the Court had in mind, *with reference to the facts in DeKalb County, which it exhaustively detailed,* when it referred in Section 6(a) to discussions of a devotional/inspirational nature in "the classroom and in instructional settings," as distinct from graduation. It did not repeat this phrase with regard to graduation prayer. Why? Because the facts before the Court did not disclose with regard to graduation prayer, as they did with regard to prayer and devotionals over the intercom system during the instructional day, that "words of inspiration" were actually Bible readings or prayers. Thus, the Court has no reason, in regard to graduation, to say anything other than what it implicitly said in its November 12, 1997 summary

Other federal courts agree with this court about what is proscribed activity, equating "devotional" with "prayer" and/or "Bible reading." *See Schempp,* 374 U.S. at 207 (student-chosen Bible readings followed by Lord's Prayer); *Wallace v. Jaffree,* at 42 (noting complaint's equivalence of "devotional" activities with "saying prayers in unison"); *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n,* 766 F.2d 932, 937 (6th Cir.1985) ("devotional thought" is "something fresh to me from the Scriptures"); *EEOC v. Townley Engineering & Manufacturing Co.,* 859 F.2d 610, 612 (9th Cir.1988) (devotional services included "prayer, thanks to God, testimony and scripture reading"); *Bell v. Little Axe Sch. Dist.,* 766 F.2d 1391, 1397 n. 2 (10th Cir.1985) (devotional exercises also called "fellowship, prayer sessions, prayer meetings, religious sessions, religious meetings, 'sharing sessions,' and 'Prayer Service/Activity' "); *Doe v. Stegall,* 653 F.2d 180 (5th Cir. Unit A 1981) (devotional

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judgment opinion: that secular words of inspiration are permissible in that context. At graduation, the evidence being what it was, DeKalb County is enjoined from offering devotional messages, not from offering any secular inspirational message.

activities were "poetry, Bible verses and prayers of a Protestant cast"); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573 (5th Cir.1977) (en banc), *cert. denied,* 439 U.S. 1089, 99 S. Ct. 872, 59 L. Ed. 2d 56 (1979) (devotionals consisted of "prayer and Bible reading"); *Alabama Civil Liberties Union v. Wallace,* 331 F. Supp. 966, 969 (M.D. Ala.1971) (Judge Varner finding that Bible readings are devotionals), *aff'd per curiam,* 456 F.2d 1069 (5th Cir.1972); *Herdahl v. Pontotoc County School Dist.,* 933 F. Supp. 582, 585 (N.D.Miss.1996) (devotionals were short inspirational messages often including Bible reading, frequently followed by a prayer).

This case was not litigated in the dark for going on two years. The record in this case reveals what a devotional is, and in this case, devotionals look a lot like the unconstitutional activity in the above-cited cases, especially *Herdahl.* Devotionals are religious, not secular words of inspiration. DeKalb County can understand this.

The Attorney General apparently is confused by the Court's specific reference to using a "Historian's Address" as a ruse for graduation prayer--which the evidence in this case shows

occurred--and has appended a prayer in the guise of a class "Historian's Address" that actually occurred to his general speculation about references to history or historical figures that have not occurred. This is not a reasonable reading, and it disregards the record.

This is the mataphorical [sic] apples and oranges dumped out of the cart into reason's path, hoping to trip it. It is clear from the Court's injunction that offering speech about historical figures, including religious ones, is permissible, and it is not permissible to offer *prayer* in the guise of a "Historian Address," as Sylvania High School did in 1996 and 1997 while this lawsuit was pending, the 1997 prayer occurring after plaintiffs' counsel had expressed objection to DeKalb County counsel. It is to this pointed "Historian Address" experience, not to Mother Teresa, that a particular provision for this contingency is made in the Court's injunction.

In short, the issue is not, as the Attorney General argues, whether students have free speech rights to expound on the topic of their choice in a graduation speech. The issue is whether school officials have authorized someone--anyone,

student or not[49]--to insert religious exercises into the school's graduation program.

This Court, like other federal courts before it, apprehends a "devotional" to be susceptible of its common meaning.[50] Its findings of fact and summary judgment opinion bear this out:

[I]n Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered

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[49] Including Muhammad Ali. (Mot. Partial Stay at 2.)

[50] *See Random House College Dictionary* (rev. ed.1982). A "devotion" is defined as: "1. profound dedication; consecration. 2. earnest attachment to any purpose, cause, etc. 3. an assignment or appropriation to any purpose, cause, etc. 4. *Theol.*, the ready will to serve God. 5. Often, *devotions*. *Eccles.* religious observance or worship; a form of prayer or worship for special use." A "devotional" is defined as: "1. characterized by devotion; used in devotions. 2. Often, *devotionals*. a short religious service, esp. as part of a meeting, convocation, or the like." Any commonsense reading of the injunction here, informed by the evidence in this case, will indicate exactly what is meant by "devotions" and "devotionals." We are not talking about setting aside land or materials or an earnest attachment to the school principal.

by student 'volunteers' are 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the parties, as well as the Court, appear to be of the opinion that a 'devotional' is a religious exercise, that falls within the category of 'prayer, invocations and/or benedictions,' and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classroom are unconstitutional, student-led 'devotionals' are similarly unconstitutional. (Supp. Op. at 58 & n. 52) (*citing Engel, Schempp,* and *Lee*).

6. School officials *are not* required to be censors or to be clairvoyant at commencement or at student assemblies and events

The injunction contemplates that there will be no prayer, benediction, invocation or devotional at commencement exercises. The injunction contemplates that no student will offer one. *See* Section 6(b). However, the injunction does not contemplate censorship by school officials; if it did, it would not call for school officials to take

appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct *as it occurs* and deterrence of such conduct in the future.

The same is true of student assemblies and sporting events. The injunction contemplates that there will be no prayer, scriptural readings, or devotional messages over the public-address system during the school day or at school-sponsored assemblies or events. However, the injunction does not contemplate censorship or prior restraint by school officials; if it did, it would not call for school officials to take appropriate disciplinary action as they would for any violation of school disciplinary rules that is calculated to cause cessation of the conduct as it occurs and deterrence of such conduct in the future.

This argument is simply a shibboleth. It is clear what the Court meant to prohibit, and it is clear that school officials--who have sat through a great many prayers in DeKalb County classrooms, as well as at football games, assemblies, and commencement exercises--know prayer when they

see it.

7. A parent *can* pray for an injured player while the parent is seated in the stands

The Plaintiffs have looked in vain for a portion of the injunction that would prohibit such prayers, as the Attorney General alleges. It is difficult to see how a parent who prays while seated in the stands, whether out loud or silently, would ever fall within the category of prohibited "school organized" or "officially sanctioned" prayers over the public address system at sporting events. (Injunction at 6-7). [sic] It is also difficult to see how a school official could either prevent or permit a parent from praying in the stands and so run afoul of the injunction.

The Attorney General's similar ... claim that a student cannot bow his head in prayer after scoring the winning touchdown is likewise not the reading of a reasonable person. Although Section 6(d) does not expressly provide that he can, Section 6(c) is the provision that is applicable to prayer over the public-address system at high school football games. The Attorney General's hypothetical does not feature the football player seizing the public-address system and

commandeering the audience, which would be proscribed under Section 6(c).[51] These examples indicate the way in which the Attorney General has seized on one little snippet of the injunction in order to sound the alarm bell without reading particular provisions in context or with regard to the facts or the totality of circumstances.

8. Student Bible Clubs *can* meet on the same terms as other student clubs

According to the Attorney General, the injunction would prohibit a student-initiated Bible Club from meeting on campus, even after school hours, and would prohibit students from publicizing the times and locations of such meetings. (Mot. Part. Stay at 6-8.) only through a tortured reading of the injunction could one arrive at such a conclusion, and the law does not require courts or parties to twist themselves into knots trying to find an unconstitutional meaning in an otherwise plain directive.

The provision of the injunction which the Attorney General finds offensive reads:

This PERMANENT INJUNCTION DOES NOT

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[51] [Not adopted].

affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq.*, or to quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious material to classmates during noninstructional time, subject to the same time, place and manner restrictions imposed on student distributions of nonreligious materials.... (Inj. at 4.) Manifestly, the injunction "does not affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act." (Inj. at 4.) The religious activity permitted by the federal Equal Access Act--the use of school facilities by student-initiated noncurricular Bible clubs on the same basis as other noncurricular clubs--is expressly protected. *See Westside Comm. Schl. v. Mergens,* 496 U.S. 226, 110 S. Ct.

2356, 110 L. Ed. 2d 191 (1990). The injunction also allows "students" (and there is nothing in the injunction which excludes members of the Bible Club from the general category of "students") to distribute "religious materials" to their classmates, on the same terms that nonreligious materials are distributed. Later, the Court clarified the rights of student Bible club members to have access to the public address system to publicize their meetings:

> This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of noncurricular religious clubs, ... provided that any such announcements are subject to the same time, place and manner restrictions that apply to announcement of nonreligious activities. (Injunction at 7.)

As acknowledged by the Attorney General, this is precisely what federal law requires. (*See* Mot. Partial Stay at 8 ("official recognition allows student clubs to be part of the student program and carries with it access to the school newspapers, bulletin boards, the public address system and the annual Club Fair") (*quoting Mergens*).) The combination of the two clauses should solve the

Attorney General's problem with the injunction and end disputes about the rights of Bible Club members. The plaintiffs do not see how the Court could have been less vague or more narrow.

Still, the Attorney General insists that the injunction is overbroad because it makes it clear that in addition to these other rights, students may also "quietly engage in religious activity during noninstructional times, so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves."[52] (Injunction at 4.) A reasonable person would not glean from the injunction that this additional right to pursue the religious activities of the student's choice during noninstructional times interferes with the student's separate, Equal Access Act-guaranteed right to participate in a religious club on the same basis as he might in nonreligious clubs.

(*See* Pls.' Opp'n at 10-32.)

II. Conclusion

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[52] The Court used the word "or," to indicate another item in the list of protected student activities.

Based on the foregoing, the court finds that those enjoined understand their obligations and responsibilities under the Permanent Injunction. **It is also clear that contrary to the Attorney General's strained hypotheticals, the Permanent Injunction does nothing to limit individual exercise of personal religious beliefs. The court has answered most, if not all of the Attorney General's proffered hypotheticals *in favor of the activity the Attorney General claims is prohibited.* As articulated throughout this Order, the activities the Attorney General claims are prohibited, simply put, *are not.***

Those attempting good-faith compliance with the court's Orders need not fear contempt citations. However, the court expects compliance with its Permanent Injunction unless and until it is further clarified by the Eleventh Circuit Court of Appeals or the United States Supreme Court. Counsel, in particular, are directed to make every effort to explain to their clients, in building block fashion if necessary, the exact nature and scope of the Permanent Injunction, and to endeavor to quell misunderstandings or misrepresentations, whether genuine or feigned, the latter of which appear to be running rampant.[53]

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[53] The court notes the December 8, 1997 issuance of a memorandum by the Attorney General and the State Superintendent of Education regarding "Permissible Activities in the light of *Chandler v. James.*"

The political posturing that has followed this case encourages divisiveness and apprehension, benefits neither the citizens nor the school-children of Alabama, and clouds the real issues raised by this suit: the coercive religious practices engaged in or allowed by state officials in DeKalb County. In conformance with long established precedent, which this court is bound to follow and which

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The court commends any *good-faith* effort to "clear up any misunderstandings" and "provide assistance to public school administrators and teachers." (*See* December 8, 1997 Mem., Attach. C; *see also,* Pls.' Add. Evid.) This memorandum was issued in conjunction with the Attorney General's December 8, 1997 Press Release. (*See* AG December 8, 1997 Press Release, Attach. B; *see also,* Pls.' Add. Evid.) Both documents attempt to articulate guidelines regarding permissible and impermissible conduct. Because the question of the propriety of the Attorney General and Superintendent's guidelines is not before the court, the court will not examine the issued guidelines in light of any of its previous Orders at this time.

Interestingly, however, although the Attorney General purports to have derived these guidelines exclusively from "previous opinions issued by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals, rather than the *Chandler* ruling in October by a U.S. District Court in Montgomery," (AG December 8, 1997 Press Release at 1; *see also* Pls.' Add. Evid.), the guidelines track this court's Permanent Injunction and March and November 1997 Orders, as well as the cases relied on by this court in issuing those Orders. It is indeed odd that the Attorney General now cites those cases for support when they were conveniently ignored prior to the court's March 1997 Memorandum Opinion and Order. Nevertheless, the court commends any truthful dissemination of information regarding the issue of religion in the public schools.

the Attorney General now appears to recognize as controlling, the Permanent Injunction simply proscribes state-established religion and endeavors to ensure the state's neutrality in matters of religion in the public schools. An informed understanding of the Permanent Injunction discloses nothing more.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendants' Motion For Partial Stay Of Permanent Injunction be and the same is hereby GRANTED IN PART and DENIED IN PART. Defendants' Motion is GRANTED as to the twelve words in section 6(a) of the court's three-thousand, seven-hundred and fourteen word Permanent Injunction reading "quietly" and "so long as it does not unduly call attention thereto and."[54] (*See* Permanent Inj. at 4, lines 14-16.) Otherwise,

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[54] Paragraph 5 of section 6(a) of the Permanent Injunction, with those portions stayed, should read:

> This PERMANENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during noninstructional time that is consistent with the federal Equal Access Act, 20 U.S.C. Section 4071, *et seq.*, or to ... engage in religious activity during noninstructional times, *... so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its*

Defendants' Motion For Partial Stay Of Permanent Injunction is DENIED. All other provisions of the October 29, 1997 Permanent Injunction shall remain in full force and effect absent modification by the Eleventh Circuit Court of Appeals or the United States Supreme Court. The Parties are DIRECTED to fully comply with the terms of the Permanent Injunction, absent the portion of section 6(a) STAYED above, as applicable.

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imposition upon themselves. This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during noninstructional time, subject to the same time, place, and manner restrictions imposed on student distributions of nonreligious materials, subject to the provisions of paragraph 6(e) below.

(3) Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
Volume II – Appendices E-J

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Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 96-D-169-N**

FORREST H."FOB" JAMES JR., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

In 1977, the Alabama legislature passed the first in a series of "school prayer" statutes. This first statute, which provided for a moment of silence at the beginning of the school day, *see Ala. Code* § 16-1-20 (1995), was supplemented in 1981 by a statute which specifically provided that the moment of silence "shall be observed for meditation or voluntary prayer." *Ala. Code* § 16-1-20.1 (1995). Then, in 1982, a third school prayer statute was passed which "recogniz[ed] that the Lord God is one" and permitted public school teachers to lead willing students in

a specified prayer. *Ala. Code* § 16-1-20.2 (1995). Both the 1981 and 1982 statutes were struck down because they violated the Establishment Clause of the First Amendment to the United States Constitution. *See Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985) (section 16-1-20.1); *Jaffree v. Wallace*, 705 F.2d 1526, 1535-36 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984) (section 16-1-20.2).

In 1993 the Alabama Legislature enacted a fourth statute. The operative portion of § 16-1-20.3 reads:

> (b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code § 16-1-20.3(b) (1995). In 1996, the plaintiffs filed this suit asserting, among other things, that § 16-1-20.3 is facially unconstitutional. Thus, the Court must decide whether this latest school prayer statute has been cured of the infirmities that rendered its predecessors

proceedings in the Circuit Court of Etowah County.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2]Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines Inc. v. McCoy Restaurants Inc.*, 708 F.2d 582, 585 (11 Cir. 1983). The court is quick to note, however, that when a state court in effect asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Wesch v. Folsom*, 6 F.3d 1465 (11 Cir. 1993), *cert. denied*, 114 S. Ct 696; *Kelly v. Merrill Lynch*, 985 F.2d 1067 (llth Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (llth Cir. 1989); *McCoy*, 708 F.2d 582; *Southern Petrol. Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.*, 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution -- conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *Maryland v. Louisiana*, 451 U.S. 725,

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of

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746 (1981) (*citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore*, 611 So. 2d 1069, 1071 (Ala. 1993); *White v. Reynolds Metals Co.*, 558 So. 2d 912 (Ala. 1990), *cert. denied*, 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law require its citizens to follow those rights. (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code § 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

[3]The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4 (a) (4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed

their Motion on the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot. to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as

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no later than 10 days after entry of the judgment.
Fed. R. Civ. P. 59(e).

The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with the requirements of Rule 59 (e). *See Fed. R. Civ. P.* 56(e) and 6.

[5] Rule 65 (d) provides:

> (d) Form and Scope of Injunction or Restraining Order.
>
> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. ...

Fed. R. Civ. P. 65(d).

well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.'" (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A)) Counsel stated that the purpose of the request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer.'" (*Id.* at l.)

Counsel stated to the court that he sought a conference call with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12,

1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code § 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[7]Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a).

The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a). In the alternative, and in addition to the court's issuance pursuant to Rule 60(a), the court finds that Plaintiffs Motion To Alter Or Amend the Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24, 1997, to identify with specificity the evidence in the record at that time and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These submissions, pertinent to

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[8]The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of Alabama Code § 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

[9] This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed

dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997, and is detailed in these findings of fact and

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throughout the record. For example DeKalb Defendants Answers to Plaintiffs First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiff's Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories not answered on October 10, 1996) are part of Exhibit C to Plaintiff's Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filings responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents, affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-

proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of rewarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the defendants have recognized the wrongfulness of the conduct complained of;

and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years -- before and after Alabama Code § 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb

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[10]*See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982)(discussing substantial likelihood of recurrence).

County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the Fort Payne Times Journal spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

ontinue with the status quo of unconstitutional conduct in eKalb County public schools. (Nor is this the only such ress clipping with which the court has been deluged in is case.) The court can discern in this evidence no cognition of the wrongfulness of school-sponsored eligious activity, sees scienter in the vow to "resist" udicial action, and discerns no repentance of past nconstitutional conduct. The court does not mean to ngle out Mr. Carlisle for censure. The court finds this tatement emblematic of DeKalb County school officials' istorical attitudes – judging from the record before the ourt, this statement typifies an attitude. The court eferences it specially because it is so recent.

The court also finds relevant that in Spring 1996, all arties executed an agreement that DeKalb County schools ould not undertake any practices alleged by the Plaintiffs be unconstitutional pending this court's determination of eir constitutionality. This agreement, styled "Joint lotion to Vacate This Court's Order and Agreement of oluntary Cessation of Certain Activity Pending this ourt's Decision" (hereafter "Joint Motion"), was filed ith the court in March 1996.

That document, in the court's view, constitutes a presentation of the parties *to the court*, even if the court uld not or would not enforce a voluntary agreement

among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination -- and then continue with such conduct -- persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any

---

[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13]The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating

orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code § 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential cases.

The Joint Motion promised that the school board Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

> "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"
>
> "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day. . . except that noncurricular clubs may meet

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hearing date.)

[14]Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

during noninstructional time;"

"prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

"distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;"[15]

---

[15]The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

> "prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"
>
> "the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time."

(Joint Motion, ¶ 6 and subparts.)

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities. . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were

resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997 Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael

Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint

Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials professed ignorance of, the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed the videotape, and considers

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[16]That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr. Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pre-game prayers prior to the

t powerful evidence of DeKalb County Schools' defiance of Eleventh Circuit law as pronounced in *Jager* almost a decade ago as well as evidence of DeKalb County's disregard for the proceedings pending here. The videotape features one of the intervenors,[17] a minor at Geraldine High

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iling of this lawsuit.

The court reiterates that there are two videotapes, one ncluding pre-suit graduation exercises and pregame prayer in a eries of short clips and ending with the October 19, 1996 prayer ver the public-address system by Ms. Sexton at Geraldine High chool, and the other depicting the 1997 graduation prayer at ollinsville, Plainview, and Sylvania as well as classroom prayer at eraldine. The videotape filed November 21 with the Motion to nforce includes the pre-suit graduation prayer as well as the post-uit October 1996 football game prayer. The first videotape is xhibit B to the Plaintiffs' Motion to Enforce; the second, showing ne 1997 graduation prayers, is Exhibit B to the June 9, 1997 eclaration of Michael Chandler. (*See* Affidavit of Michael handler, Feb. 1, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's esignation of Exhibits and Materials already in the Record for Rule 6 Purposes, n.4 (filed November 21, 1996).)

[17]The intervenors were allowed in for the limited purpose of *amicus uriae* participation. The court accepted affidavits from them. Had ney intervened timely, when this suit was filed or before summary dgment submissions and the court's March 1997 opinion, the court ould have granted intervention. The intervenors' affidavits do not erit separate or extended discussion. Bible Clubs may meet nsistent with the Equal Access Act; religious jewelry may be orn; students may wear "Victory Line" t-shirts of the sort depicted Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the lternative, Motion to Strike, consistent with school policy; students ay organize the "Meet Me at the Pole" event; and may generally do

School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and

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all the things the court discussed at pages 23 and 24 of its earlier opinion -- and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

prayer in the classroom at Geraldine School. Once again, some of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as ¶ 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian

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[18]The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse*. Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

address' or the designation of a student as 'historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

Mr. Chandler further testified in his June 9 Declaration that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch;

the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'one, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or

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[19]*See* Exhibit A to Joint Motion.

individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive- audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the

> lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that "'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 opinion and Order, which makes express reference to the Eleventh Circuit's specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order. In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other

year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 - 3rd period - (Friday) - BACCALAUREATE PRACTICE - This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program -- just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this intermingling of the private religious service with the school-sponsored graduation ceremony;

the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In ¶ 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August

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[20]The court notes that "tradition" contemplates ongoing, repetitive conduct.

3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials: The letter expresses Mr. Chandler's concern that school officials had expressed that they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, ¶ 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County

has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a. permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been

controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See*, e.g., Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n.3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct; including a teacher's asking for student volunteers to pray

was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with, DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb county filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it

apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce the terms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[21] Here, however, officials flagrantly defied the Eleventh Circuit rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 0pinion

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[21] *See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, ¶ 16.)[22] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in

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[23]Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

which it proceeds is out loud and in unison.

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state

may not favor religion, even over-nonreligion.[24]

Most importantly, the court is disturbed by the uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to

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[24]*See County of Allegheny*, 492 U.S. at 590-91; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in- service training repetitively or for all new hires but requires merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its

injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code § 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"

as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (2971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants Requests 5, 9, 11, 12, DeKalb

Defendants Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges -- the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

Stipulations resolve some issues.[25] Thus the court

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[25]The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

finds "[p]laintiff' Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including school-related student assemblies, compulsory and non-compulsory school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe School, which schools have students in grades K

through 12." (Stipulation 15.)

The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation 58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement

ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See and compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer

at Valley Head High School").)[26]

The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb county, ¶ 18.) Specifically, Mr. Chandler testified in his February l, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that

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[26]Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27]Meaning the year preceding filing of the lawsuit.

the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

The court notes that the DeKalb County Defendants,.in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools

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[28]The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager*, 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer.

regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February l, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at Plainview High School May 26, 1995 and that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February l, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February l, 1996 Affidavit of Michael Chandler.) Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb

Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code § 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb County, ¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995

Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code § 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that

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[29]The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30]The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31]The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the First Amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code § 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may

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[32]The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33]*Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp* , 374 U.S. 203, 224-25 (1963).

[34]*See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee*, the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

In the Eleventh Circuit, pursuant to *Jager*, "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school- sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that even nonsectarian prayer is

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[35]*See also Schempp*, 374 U.S. at 226; *Engel*, 370 U.S. at 430.

[36]*Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

proscribed.[37]The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for

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[37]*Lee*, 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are nonsectarian -- because the school board has claimed the statute authorizes the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in sectarian prayers, either.

[38]*See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See*, *e.g.*, 1995 program for Plainview High School showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to

imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February l, 1996 Affidavit of Michael Chandler, excuse students from class for baccalaureate practice.[39]

Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and, that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour

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[39]Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203 (1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in

"homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February l, 1996 Affidavit, "From what I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the

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[40]In *Schempp*, Bible readings opened the school day; the practice was struck as unconstitutional. *See also Berger*, 982 F.2d 1160, 1171 n.6 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

fifth and twelfth grades. Mr. Chandler testified in his February l, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the l2th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request f or Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school,

a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that he permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41] The classroom is not traditionally a public forum.[42] The court notes that in *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school

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[41] *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[42] *See Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43] The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] "The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to

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[44] *Berger*, 982 F.2d at 1167.

[45] *Id.* at 1168.

[46] *Id.*

infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and

to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the injunction can be modified to embody only the reasonable time restrictions of the policy.[47]

Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95

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[47]The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, "Defendants admit that Ms. Carroll asked for volunteers to lead prayers." Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, student-initiated voluntary prayer, non-proselytizing, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that

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[48]At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and may regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50]The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary qualities and that "such study of the Bible, when and historic presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

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[49]*Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd..*, 884 F. Supp. 1097 (E.D. Va. 1993).

[50]*Lee*, 505 U.S. at 592-95.

The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 opinion and order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.) This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe

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[51]DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18, 1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education. (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R:E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb Defendants' Response

to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'nonsectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious

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[52]*See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp's* admonition that no breach is trivial controls the court's analysis.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview School. The court specifically finds that DeLayne Etherton's affidavit establishes that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God We Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

Plaintiffs' November 6, 1997 Motion to Enjoin Proceedings in the Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend: Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc*.

The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this

Supplemental Opinion and Order.[53]

The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[53]In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its Findings Of Fact And Conclusions Of Law articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions.
The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

[54]The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER.** Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States

Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of neutrality toward religion" *Jager v. Douglas County School District*, 862 F.2d 824, 828 (11 Cir. 1989)(citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale*, 370 U.S. 421, 434 (1962).)

The right to be free from state-established religion lies at the heart of the concept freedom embodied in the First Amendment to the United States Constitution. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree*, 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist or agnostic schoolchildren to participate in Muslim religious activities just as the

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state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only -- under the First Amendment, each individual is entitled to their own beliefs free from state intrusion).

Regardless of whether state officials state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree*, 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53. ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, **the court's Permanent Injunction DOES NOT restrict schoolchildren's First Amendment rights** – *it actually protects those rights from unwarranted and unconstitutional interference from the state.*

Appendix F

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

MICHAEL CHANDLER, et al.,

Plaintiffs, **CV 96-D-169-N**

v.

FOB JAMES, et al,

Defendants.

PERMANENT INJUNCTION

In accordance with the court's previous opinions, as well as the record as a whole in this cause, it is CONSIDERED and ORDERED as follows:

1. The Defendant Governor of Alabama, his successors in office, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing,

ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

2. The Attorney General of Alabama, his successors in office, and all those in active concert and participation with him or her, including, but not limited to, all deputy and assistants Attorneys General, are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

3. The Defendant Alabama State Board of Education, its officers, agents, servants, employees, successors and assigns, and all those in active concert and participation with him or her are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

4. The Defendants, and each of them, Ed Richardson,

Bradley Byrne, Stephanie Bell, G.J. "Dutch" Higginbotham, Ethel H. Hall, Willie Paul, David F. Byers, Jr., Sandra Ray, and Mary Jane Caylor, and each of their successors in office, and all those in active concert and participation with each are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1- 20.3 and any regulations, directives, or policies implementing its provisions.

5. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, permitting, procuring, or otherwise enforcing the provisions of Alabama Code § 16-1-20.3 and any regulations, directives, or policies implementing its provisions.

6. The Defendants, and each of them, DeKalb County Board of Education, Weldon Parrish, Willard A. Israel, Tommie Johnson, Mary Etta Bailey, Johnny Young, and Jimmy Wilbanks, and each of their successors in office, and all those in active concert and participation with each (including, but not limited to, principals, school administrators, staff and teachers employed, assigned, or utilized within the DeKalb County school system) are herewith PERMANENTLY ENJOINED from each and all of the following activities, policies, practices, and conduct:

(a) Regarding Classroom Activities and Instructional Settings. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized* or *officially sanctioned* religious activity in the classrooms of DeKalb County schools *including, but not limited to*: vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students.

This PERMANENT INJUNCTION DOES NOT proscribe the educational use of religious texts in the classroom to

the extent that material so used is presented in an objective and academic manner, for example, as part of a course of study.

This PERMANENT INJUNCTION DOES NOT proscribe students' voluntary expression of their own religious beliefs in the form of homework, reports, artwork, or other school assignments as applicable and as academically appropriate.

This PERMANENT INJUNCTION DOES NOT proscribe the display of religious symbols, articles and medals (for example, Crosses and Stars of David) and/or clothing bearing religious messages (provided that the school allows students to display non- religious expressive symbols and apparel and such display is in accordance with all applicable time, place, and manner restrictions).

This PERMANNENT INJUNCTION DOES NOT affect the rights of secondary-school students to engage in religious activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, or to quietly engage in religious activity during non-instructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves.*

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place, and manner restrictions imposed on student distributions of non-religious materials, subject to the provisions of paragraph 6(e) below.

(b) Regarding Graduation or Commencement Exercises. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, prayers, invocations, benedictions, or devotional messages at graduation or commencement exercises, regardless of whether such prayer, invocation, benediction, or devotional message is offered by clergy, a student, administrator, teacher, school employee, or non-school person, regardless of how such prayer, invocation, benediction, or devotional message is denominated, and regardless of whether a public-address system is used. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from permitting such activity at commencement or graduation exercises in the guise of valedictory, salutatory, historian, or similar student addresses and remarks.

This PERMANENT INJUNCTION DOES NOT proscribe

a brief personal expression by a student which contains religious references during a commencement exercise or student address (for example, a student may express thanks to Deity for his or her academic success),[1] provided that such expression is not encouraged in any by school officials and does not invite audience participation or response (for example, a student speaker may not invite the audience to participate with him or her in prayer or urge the audience to take a moment with him or her to thank Deity). Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future.

The Defendants, and each of them, are further PERMANENTLY ENJOINED from listing, announcing, or memorializing any religious activity or message on any

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[1] This is but one example of a brief permissible reference by a student to Deity or religion. This example is not meant by the court to suggest any form of expression to any student or to suggest that this is the only such reference that would be permissible. It is intended to be illustrative only, and to assist school officials in complying with the terms of this PERMANENT INJUNCTION.

commencement program at any DeKalb County school. The Defendants, and each of them, are specifically PERMANENTLY ENJOINED from printing baccalaureate announcements or commemorations or other materials regarding baccalaureate services on the commencement programs of DeKalb County public schools and from organizing or sponsoring any baccalaureate event (although they may attend). School officials are prohibited from encouraging or discouraging, directly, or indirectly, a student's attendance at baccalaureate services.

Specifically, school officials may not condition a student's attendance at commencement exercises on attendance at baccalaureate events.

(c) Regarding Use of Public-Address Systems for Religious Addresses. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, or permitting, students, school employees, school officials, clergy, and non-school persons to pray or to deliver religious or devotional messages (including scriptural readings) over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including,

but not limited to, assemblies and sporting events. This provision includes the delivery of daily announcements. No exception to this provision shall be permitted during times of perceived crisis or exigent circumstances. Where enjoined activity by students occurs, it is CONSIDERED that school officials be and they are hereby ORDERED to take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of such violative conduct as it occurs and to deter similar conduct in the future.

This PERMANENT INJUNCTION DOES NOT prohibit students from making announcements over the school public-address system regarding meetings of non-curricular religious clubs, provided that the announcements themselves do not contain a prayer or devotional, and provided that any such announcements are subject to the same time, place, and manner restrictions that apply to announcements of non-religious activities.

(d) Regarding School-Sponsored Assemblies and Events. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise participating in, or permitting, prayers, Biblical and

scriptural readings, and other presentations or activities of a religious nature, at all *school-sponsored* or *school-initiated* assemblies and events (including, but not limited to, sporting events), regardless of whether the activity takes place during instructional time, regardless of whether attendance is compulsory or non-compulsory, and regardless of whether the speaker/presenter is a student, school official or non-school person.

This PERMANENT INJUNCTION DOES NOT prevent secondary-school students from engaging in religious expression and activity during non-instructional time that is consistent with the federal Equal Access Act, 20 U.S.C. § 4071 *et seq*, which, while according students expressive rights, does not allow school officials to provide special privileges to non-curricular student religious clubs in terms of meetings and assemblies that they do not provide to other student clubs.

(e) Regarding Distribution of Bibles and Other Religious Tracts. The Defendants, and each of them, are PERMANENTLY ENJOINED from aiding, abetting, commanding, counseling, inducing, ordering, procuring, or otherwise permitting, school officials or non-school persons to enter any classroom or any school property where students are assembled, for the purpose of

distributing Gideon Bibles or other religious tracts, literature, or paraphernalia to students on school property during the school day, including the home room period and any period during which students are required to be present in school, or at any school-sponsored event.

No distribution of Gideon Bibles or other religious tracts, literature, or paraphernalia by placement of them in a common area shall occur in the absence of a formal, written policy adopted by the DeKalb County Board of Education governing distribution of materials from non-school persons in DeKalb County public schools generally.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED that within thirty (30) days of the date of this PERMANENT INJUNCTION, Defendants shall promulgate a written policy of general application for all DeKalb County public schools, binding upon all school principals, teachers, and other school employees uniformly in each public school in DeKalb County, to govern such distributions in terms of time, place and manner restrictions; and Defendants shall serve a copy of the same upon Plaintiffs' counsel, who, within ten (10) days, shall list any objections, and shall submit the same to this court for its rejection or concurrence. Following court approval, the Defendants shall publish and shall distribute to each

school principal a copy of the written policy, with instructions that it shall be followed in each DeKalb County public school.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to provide *immediately* to the Gideons International representatives who are known by them to have visited DeKalb County schools, or to their designated organizational representative, a copy of this PERMANENT INJUNCTION.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to inform the organization in writing, *immediately*, that students shall not be harassed with regard to acceptance or non-acceptance of any Gideon Bibles that may occur while its representatives are situated on public property near the school, (such as the public sidewalk), if students who are approached for distribution are still situated on or boarding school property, and that they shall not throw or pass Gideon Bibles through the windows or doors of DeKalb County school buses or otherwise act in an aggressive manner toward students with regard to any distribution of Gideon Bibles while those students are still situated on school property (for example, standing in line in the school parking lot to board the bus and still under school officials' general supervision

and protection, or boarding the public school bus).

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to send a copy of this written notification to Plaintiffs' counsel and to file a copy with the court.

It is further CONSIDERED that Defendants be and the same are hereby ORDERED to follow the exact steps enumerated herein for any non-school group or person other than the Gideons International that wishes to have access to students for the purpose of distributing Bibles, religious tracts, religious literature, or religious paraphernalia.

In the event of a violation of this PERMANENT INJUNCTION, and in the event of aggressive or harassing behavior of the sort proscribed herein, school officials shall take action to cause the violative conduct to cease immediately.

This PERMANENT INJUNCTION DOES NOT prohibit students from distributing religious materials to classmates during non-instructional time, subject to the same time, place and manner restrictions imposed on student distributions of non-religious materials.

(f) Regarding Parties, School Officials, and Potential Witnesses Connected With This Lawsuit. It is CONSIDERED that the Defendants be and the same are hereby ORDERED to direct school officials to intercede to stop religiously based harassment of the minor child, Jesse Chandler, by other students or by any school official or non-school person, if and when they observe it on school grounds or are notified of its occurrence on school grounds, including in the lunchroom of Fyffe School. School officials shall take immediate and prudent protective action when notified of any such occurrence or likely occurrence. Nothing in this provision is intended to chill the rights of students to persuade their fellow students on religious matters or to impose on school officials an affirmative duty to prevent conduct of which they have no notice, but rather to impose an obligation to protect a minor child from oppression where it is observed or comes to the attention of school officials.

It is further CONSIDERED that the Defendants, and each of them, be and the same are hereby ORDERED not to retaliate in any way against the Plaintiffs for filing this lawsuit, or to retaliate in any way against those persons identified in affidavits submitted by the Plaintiffs in this lawsuit as persons who support this lawsuit or who oppose

school-sponsored religious activity in DeKalb County public schools, and specifically Mrs. Whiteside.

7. AND AS FURTHER AFFIRMATIVE RELIEF, IT IS CONSIDERED AND ORDERED THAT DEFENDANT DEKALB COUNTY BOARD OF EDUCATION SHALL:

(a) Distribute copies of the court's opinions and this PERMANENT INJUNCTION to each school principal within the DeKalb County system immediately, with instructions that each such principal inform faculty, staff, and students that the court requires compliance;

(b) Post, or make available, in areas commonly utilized for communicating notices or information to both students and faculty (such as the faculty lounge, bulletin boards, etc.) in each DeKalb County public school, a copy of this PERMANENT INJUNCTION, which shall remain so posted until the same expires;

(c) Maintain in the library available for circulation in each DeKalb County public school a copy of "The Riley Letter" in the form in which it appears as Exhibit A to the parties' Joint Motion to Vacate Trial Setting and Voluntary Cessation Agreement and a copy of the monograph entitled "Religion in the Public Schools: A Joint Statement of Current Law," which shall remain available for circulation

until this PERMANENT INJUNCTION expires;

(d) Distribute to the Parent Teacher Organization, Parent Teacher Association, Parent Teacher Student Association, or similar group for parental participation in school affairs, at each DeKalb County public school, a copy of this PERMANENT INJUNCTION and a copy of the court's opinions in this matter, with the following statement attached to it:

> The purpose of the court's injunction is to protect the religious rights and freedoms of students in DeKalb County public schools, to prohibit religious activities from being included in official school activities, and to prohibit DeKalb County public schools from sponsoring religious activities. If you believe that any of the rights and prohibitions specified in the injunction are not being observed at your child's school, you should contact [the court-approved monitor which/who shall be selected in accordance with the provisions of paragraph (g) below; name, address and telephone number shall be provided with this notice].

(e) Conduct a mandatory in-service training session for

faculty and administrators in DeKalb County public schools that is reasonably designed to familiarize these school officials with the provisions of this PERMANENT INJUNCTION, the general contours of Establishment Clause and Free Exercise principles as the court has explained them in its opinions in this case, their rights and duties in connection with the controlling law of church and state relations in the public-school setting, and the general issue of school officials' tolerance for diversity in religious opinion and duty of neutrality in matters of religion when acting in their official capacities. This in-service training shall be conducted during time regularly set aside for such purposes but shall occur during the 1997-98 school year. The Defendants shall not be obligated to conduct an in-service session for new faculty and administrators each year who were not present for the 1997-98 in-service training, but shall be required to direct all such new faculty and administrators to read and acknowledge in writing that they have read the curricular/teaching materials used at the 1997-98 in-service session, a copy of which shall be maintained by the DeKalb County Board of Education for this purpose.

The curricular materials used for this purpose shall be the court's opinions in this matter, this PERMANENT INJUNCTION, and in addition, one of the following: (a)

the Anti-Defamation League's "A World of Difference" program; or (b) a similar program of religiously neutral, nonsectarian content selected by the DeKalb County School Board and submitted to the court-appointed monitor referenced in paragraph (g), below, for his, her, or its approval, with a copy served on Plaintiffs' counsel for the purpose of tendering specific written objections within ten (10) days of service. If a nomination is not made by the Defendants within forty-five (45) days of the date of this PERMANENT INJUNCTION, the court will select the curricular materials, with due regard for the recommendation of the court-appointed monitor.

The DeKalb County Board of Education shall pay the costs of the in-service curricular materials, and;

(f) Cause its counsel to certify to the court, each September 30, December 31, March 31, and June 15, for each school year until further order of the court, that each school within the DeKalb County school system is in compliance with this PERMANENT INJUNCTION, and to send a copy to the person or entity referenced in paragraph (g) below, the State Department of Education, and to Plaintiffs' counsel; and

(g) Within thirty (30) days of the issuance of this PERMANENT INJUNCTION, nominate and submit in

writing, *in conjunction with counsel for the Plaintiffs*, three (3) neutral entities or persons, with a description of qualifications, to serve as a monitor for the purpose of insuring compliance with this PERMANENT INJUNCTION. The Parties shall *jointly* arrive at the list of three (3) neutral entities or persons nominated to serve as monitor. The court will appoint one of these three nominees to serve as its monitor. Failing the nomination of a neutral entity or person within thirty (30) days of the issuance of this PERMANENT INJUNCTION, or absent a nominee acceptable to the court, the court will appoint a monitor of its own choosing.

The monitor shall have the power and authority to:

(i) enter any classroom or public school property, school assembly, sporting event, commencement exercise, or school-sponsored or school-initiated event for the purpose of observing and reporting on compliance for the duration of this PERMANENT INJUNCTION; and

(ii) collect complaints regarding any violation of any provision of this PERMANENT INJUNCTION for the purpose of investigating violations and if warranted, reporting them immediately to the court; and

(iii) verify that there are no violations of the provisions of

this PERMANENT INJUNCTION during each of the periods referenced in paragraph (f) above, and tender verification to the court within 10 days of the passage of the dates specified in paragraph (f) above; and

(iv) engage in *ex parte* communications with the parties and any persons or entities: (1) in the course of conducting investigations based on complaints; (2) in verifying compliance with this PERMANENT INJUNCTION; and (3) in furtherance of his, her or its responsibilities under this PERMANENT INJUNCTION; and

(v) engage in *ex parte* communications with the court.

The monitor shall be paid, by the DeKalb County Board of Education, a reasonable fee for services and expenses as shall be independently reviewed and approved by the court upon petition for fees within ten (10) days following the dates specified in paragraph (f) above in connection with monitoring compliance with the provisions of this PERMANENT INJUNCTION.

8. The court shall retain jurisdiction of this matter until further order of the court, with power to enforce the provisions of this PERMANENT INJUNCTION by all means, writs, and remedies available to it, including, but not limited to, the exercise of its powers of contempt for

violation of the terms hereof.

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The United States Marshal is hereby DIRECTED to personally serve a copy of this PERMANENT INJUNCTION, together with the FINAL JUDGMENT AND ORDER and MEMORANDUM OPINION, upon Defendants: the Honorable Forrest W. ("Fob") James, Jr., Governor of the State of Alabama; the Honorable William H. Pryor, Attorney General of the State of Alabama; the Honorable William Gray, Legal Advisor to the Governor; the Honorable Ed Richardson, Superintendent of Education for the State of Alabama; and the Honorable Richard Land, Superintendent of the DeKalb County Board of Education.

All costs herein incurred shall be and the same are hereby assessed against the DeKalb County Board of Education, for which let execution issue.

DONE this the 29th day of October, 1997.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

Appendix G

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

MICHAEL CHANDLER, *et al.*,

Plaintiffs,

CV 96-D-169-N

vs.

FOB JAMES, *et al.*,

Defendants.

SUPPLEMENTAL OPINION AND ORDER

Pending before the court are several motions and procedural matters that the court finds are due to be addressed.

I. Plaintiffs' November 6, 1997 Motion To Enjoin The Etowah County Circuit Court Proceedings

On November 4, 1997, the Circuit Court of Etowah County issued a temporary restraining order, ("T.R.O."),

"to prohibit the implementation of the District Court Permanent Injunction in this jurisdiction."[1] (T.R.O. at 3.) On November 6, 1997, Plaintiffs filed a "Motion To Enjoin Proceedings In The Etowah County Circuit Court." On the same date, the court issued an Order inviting all parties to respond to Plaintiffs' Motion on or before 2:00 P.M., November 10, 1997.

On November 10, 1997, the Defendant Attorney General of Alabama filed a Response stating that the Etowah County action, styled *Womack v. Etowah County Board of Education et al.*, CV-97-1282-RSM, was voluntarily dismissed by the plaintiffs in that action. A copy of the "Voluntary Dismissal Of Action" was attached to the Attorney General's pleading. In addition, and on the same date, the Defendant Governor of Alabama filed a Response in which he urged dismissal of Plaintiffs' Motion to Enjoin based on the plaintiffs' voluntary dismissal of the

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[1]The court issued a Permanent Injunction in this cause on October 29, 1997 prohibiting and enjoining : (1) enforcement of Alabama Code § 16-1-20.3 by various state officials, and (2) specific religiously coercive practices in DeKalb County undertaken by school officials pursuant to Alabama Code § 16-1-20.3. The Permanent Injunction, as well as the court's March 12 1997 Memorandum opinion and order, also detail activities that are permitted pursuant to the First Amendment of the United States Constitution, as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

proceedings in the Circuit Court of Etowah County.

Based on the pleadings of the Governor and the Attorney General, as well as the notice of dismissal attached to the Attorney General's pleading, the court finds that Plaintiffs' Motion To Enjoin the Etowah County proceeding is due to be denied as moot.[2]

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[2]Nevertheless, the court notes that the All-Writs Act, 28 U.S.C. § 1651, and the express exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, allow federal courts to exercise their discretion to enjoin state proceedings. The court is acutely aware of the principle of comity inherent in our federalist system of government, and the court is reluctant and hesitant to enjoin proceedings in a state court. Federal enjoinment of state litigation is to be the exception, not the rule. *Delta Air Lines Inc. v. McCoy Restaurants Inc.*, 708 F.2d 582, 585 (11 Cir. 1983). The court is quick to note, however, that when a state court in effect asserts the power of appellate review over the judgments and orders of a federal court properly exercising its jurisdiction, and in addition, the state court interferes with the proper and lawful orders of the federal court, the state court is acting without jurisdictional authority, and enjoinment of its proceedings may be proper. *See generally Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Wesch v. Folsom*, 6 F.3d 1465 (11 Cir. 1993), *cert. denied*, 114 S. Ct 696; *Kelly v. Merrill Lynch*, 985 F.2d 1067 (llth Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (llth Cir. 1989); *McCoy*, 708 F.2d 582; *Southern Petrol. Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960); *Jacksonville Blow Pipe Co. v. R.F.C.*, 244 F.2d 394 (5th Cir. 1957).

This court, and ALL courts for that matter, have the duty and obligation to preserve, protect, and defend rights guaranteed to all citizens under the United States Constitution -- conflicting state laws are "null and void," and "without effect." *See Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982); *Maryland v. Louisiana*, 451 U.S. 725,

II. Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction[3]

Also before the court is Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Injunction pursuant to Rule 59 of the Federal Rules of Civil Procedure.[4] Plaintiffs filed a Brief in support of

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746 (1981) (*citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)); *see also* U.S. Const. art VI; *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816); *Ex parte Sizemore*, 611 So. 2d 1069, 1071 (Ala. 1993); *White v. Reynolds Metals Co.*, 558 So. 2d 912 (Ala. 1990), *cert. denied*, 469 U.S. 912 (1990). Indeed, the Governor and Attorney General of Alabama recognize this basic foundation of our system of government: "The State of Alabama cannot create, expand, or diminish federal constitutional rights. The State of Alabama must, however, recognize those rights and in conformity with federal law require its citizens to follow those rights. (Governor and Attorney General's Resp. Br. On Constitutionality of Alabama Code § 16-1-20.3 at 5-6, filed February 6, 1997.) As the legal, social, and political dictates of the last half-century have shown, federal courts take seriously this responsibility to protect such rights, and can and will intervene where necessary and proper.

[3]The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4 (a) (4); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982).

[4] Rule 59(e) of the Federal Rules of Civil Procedure provides:

> (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed

their Motion on the same date. Plaintiffs contend that "specific factual findings in [the court's October 29, 1997 Permanent Injunction] will be of great benefit to the parties." (Pls.' Mot. to Alter or Am. at 1.) In addition, Plaintiffs contend that specific factual findings will satisfy the technical requirements of Rule 65.[5] (Pls.' Br. In Supp. of Mot. to Alter or Am. at 1-2.) Accordingly, Plaintiffs request that the court "make explicit its reasons for granting the injunctive relief it did." (*Id.* at 2.)

Prior to the filing of Plaintiffs' Motion To Alter Or Amend, the court was in the process of formulating and entering specific findings of fact and conclusions of law in support of its October 29, 1997 Permanent Injunction, as

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no later than 10 days after entry of the judgment.
Fed. R. Civ. P. 59(e).

The court issued its injunction on October 29, 1997. Accordingly, Plaintiffs' November 10, 1997 Motion To Alter or Amend comports with the requirements of Rule 59 (e). *See Fed. R. Civ. P.* 56(e) and 6.

[5] Rule 65 (d) provides:

> (d) Form and Scope of Injunction or Restraining Order.
>
> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts sought to be restrained. ...

Fed. R. Civ. P. 65(d).

well as addressing pending motions before the court. On October 23, 1997, counsel for some of the named Defendants in this action, filed a "Request For Conference Call." In that request, counsel stated that "[a] long-term and respected educator in the DeKalb County School System has been quoted as saying that 'I'm not going to break the law but I want to find out, or I want our attorneys to find out, if a federal judge can do whatever he wants to whenever he wants to.'" (Req. For Conference Call ¶ 1 (quoting newspaper article attached as App. A)) Counsel stated that the purpose of the request was "to clarify whether 'a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer.'" (*Id.* at l.)

Counsel stated to the court that he sought a conference call with the Court and the parties to see what rational procedure could be followed to make sure [the educator] is clear what jurisdiction this Court has over public officials in DeKalb County and what can be done to assure that [the educator] does not engage in action that would put him or others similarly situated in contempt of this Court." (*Id.* ¶ 2)

Counsel's Request reinforced the sensitive and urgent nature of the matter and issues before the court. Prior to his request, the court had issued its March 12,

1997 Memorandum Opinion and Order, ("March 1997 Opinion and Order"), in which the court found that Alabama Code § 16-1-20.3 was unconstitutional and granted summary judgment for the Plaintiffs on that issue. Plaintiffs' Complaint, however, sought not only a declaration that § 16-1-20.3 was unconstitutional, but also relief from the alleged religiously coercive activities of DeKalb County school officials relying on § 16-1-20.3 in support of their actions.

Even after the court's March 1997 Opinion and Order finding the statute unconstitutional, as noted *supra*, as of October 23, 1997, several motions and issues were still pending, including the issue of the relief necessary to alleviate the alleged religiously coercive activity in the DeKalb County School System. Based on counsel's request, the plethora of pleadings filed by the parties suggesting courses of action and grounds therefor, and the evidence in the record, the court entered its Permanent Injunction on October 29, 1997.[6]

As the introductory paragraph of the injunction

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[6] Additionally, in issuing its October 29, 1997 Permanent Injunction, and the "Findings Of Fact And Conclusions Of Law" articulated in this Supplemental Opinion and Order, the court applied the requirements and standards of Federal Rule of Civil Procedure 65, as well as interpretive case law, in determining the propriety of issuing its Permanent Injunction.

notes, it was based on "the court's previous opinions, as well as the record as a whole in this cause." (Permanent Inj. at 1.) The court entered its Permanent Injunction for the reasons articulated above, and herein, and now enters this Supplemental Opinion and Order, including the following "Findings Of Fact And Conclusions Of Law," pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.[7]

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[7]Rule 60(a) provides:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed. R. Civ. P. 60(a).

The court is aware of the filing of notices of appeal by various parties in this action. However, as noted, the court retains jurisdiction of this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a); *Griggs*, 459 U.S. at 59. Further, the court believes that it is acting within the confines of Rule 60(a). In the alternative, and in addition to the court's issuance pursuant to Rule 60(a), the court finds that Plaintiffs Motion To Alter Or Amend the Court's October 29, 1997 Injunction is due to be granted. The court's specific findings of fact and conclusions of law are articulated *infra*.

III. Findings Of Fact And Conclusions Of Law[8]

In order to assist the court with identifying evidence in the record, the court directed the parties on April 24, 1997, to identify with specificity the evidence in the record at that time and to attach where possible copies of any documentary evidence already in the record, without further argument or embellishment, that was pertinent to dispositive motions.[9] These submissions, pertinent to

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[8]The court makes few factual findings in connection with its March 1997 Opinion And Order on the facial validity of Alabama Code § 16-1-20.3 as it believes that matter to be one of law and not one of fact. It finds that the only "fact" not already addressed in its previous opinion that is relevant to statutory construction is whether the persons challenging the statute have standing to do so. The court finds that Michael Chandler is an assistant principal at Valley Head High School, within the jurisdiction of the DeKalb County Board of Education, and the father of the minor child Jesse Chandler, a student at Fyffe School within the jurisdiction of the DeKalb County Board of Education. (*See* Stipulation Number 15 regarding DeKalb County Board of Education's control over these schools.)

[9]This was necessary because the court had directed that all evidence bearing on factual issues relevant to pending dispositive motions involving DeKalb County be submitted by November 21, 1996. As of that time, however, the record establishes that the DeKalb County Board of Education had not yet responded fully to Plaintiffs' discovery requests and did not do so until after November 21, 1996. When the Plaintiffs received such responses, they submitted them in the order in which they were received, in connection with filings that had nothing to do with discovery *per se*. As a consequence, evidentiary submissions bearing on both dispositive motions and the Plaintiffs' general request for injunctive relief are dispersed

dispositive motions, were received in May 1997 from the Plaintiffs and from DeKalb County.

However, further evidence bearing on the Plaintiffs' entitlement to injunctive relief against the DeKalb County Board of Education generally has been filed since May 15, 1997, and is detailed in these findings of fact and

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throughout the record. For example DeKalb Defendants Answers to Plaintiffs First Set of Interrogatories, apparently served December 3, 1996, were filed with the court as an exhibit to a motion having no relevance to a discovery dispute, as was [DeKalb] Defendants' Response to Plaintiff's Request for Admissions, apparently served on October 10, 1996. DeKalb Defendants' Responses to Plaintiffs' First Discovery Requests, served February 4, 1997 (answering interrogatories not answered on October 10, 1996) are part of Exhibit C to Plaintiff's Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time. Evidence of probative value, generally, as it relates to injunctive relief is sprinkled throughout the record and has continued to trickle in through the 1997-98 academic year.

Plaintiffs' filing responding to DeKalb County's May 15, 1997 submission include protest that DeKalb may not offer as "stipulations" matters as to which the Plaintiffs refused to stipulate, specifically those stipulations after September 1996 numbered 75 through 81 proffered by DeKalb. Upon Plaintiffs' motion, DeKalb County withdrew any materials that were submitted in May 1997 that varied from evidence that was already in the record.

The court does not rely on any matter that was voluntarily withdrawn by DeKalb upon Plaintiffs' protest that they were untimely attempts to rehabilitate and recast DeKalb County's case after dispositive motions were under submission. The court relies on what the Plaintiffs and DeKalb have evidently agreed are actual stipulations among themselves.

conclusions of law. This evidence, generally related to religious practices since that time, has not been challenged or controverted by the DeKalb County Board of Education in any way, by affidavit or otherwise. The court finds that such evidence is appropriately received as bearing on entitlement to injunctive relief against DeKalb County and notes that DeKalb County was welcome to submit, at any time, any evidence that might contravene documents, affidavits, and other evidence submitted by the Plaintiffs in support of their claim for injunctive relief, if it had such to offer. All of this evidence is aimed at demonstrating to the court that violations have continued despite the pendency of this lawsuit and despite the court's March 1997 Opinion and Order. Accordingly, the court finds it proper and just to consider all evidence in the record for the purpose of issuing these findings of fact and conclusions of law as they bear upon the Plaintiffs' entitlement to permanent injunctive relief and will do so.

The court specifically notes that the Plaintiffs have brought both a facial and "as applied" challenge and that the DeKalb County Board of Education has specifically adopted the position that prayer and devotionals over the intercom, classroom prayer, prayer at high school graduations, and prayer at student assemblies such as D.A.R.E. ceremonies and events are "non-sectarian, non-

proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional. Having taken this position in discovery, the DeKalb County Board of Education took the position at summary judgment that the court's decision regarding the statute would resolve most if not all aspects of Plaintiffs' nonfacial challenge.

A. Factual Findings of Pre- and Post-Suit Conduct As To Pervasiveness Of Unconstitutional Conduct In DeKalb County

The court finds the following relevant to the propriety of rewarding permanent injunctive relief:

1. The court finds that school-sponsored religious activity in violation of the Establishment Clause of the First Amendment to the United States Constitution is pervasive and recurrent in the public schools of DeKalb County. The court has examined the degree of scienter of the DeKalb County School Board and its employees and agents; whether the conduct of the Defendants has been isolated or recurrent; whether the defendants have recognized the wrongfulness of the conduct complained of;

and the sincerity of any repentance of the conduct.[10]

The court finds that absent permanent injunctive relief, the substantial likelihood is that the DeKalb County Board of Education and its employees and agents will ignore the court's orders just as it has disobeyed the rulings of higher courts for years -- before and after Alabama Code § 16-1-20.3 was enacted and before and after the Eleventh Circuit outlawed prayer over the public-address system at school-sponsored sporting events. Indeed, the record in this case suggests to the court that its March 1997 Opinion and Order has been unobserved since it was entered. Although the court did not at that time make any specific orders to DeKalb County regarding graduation prayer, prayer over the public-address system, and other challenged matters, the court stresses that it drew that opinion from existing controlling case law and did not pronounce "new" general Establishment Clause law.

As recently as October 23, 1997, counsel for DeKalb County filed a "Request for Conference Call," which states that certain educators wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb

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[10]*See United States v. Laerdal Mfg. Corp.*, 73 F.3d 852 (9th Cir. 1995). *See also Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982)(discussing substantial likelihood of recurrence).

County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants to whenever he wants to." The pleading specifically expresses the concern of DeKalb County counsel that the Sylvania High School principal and "others similarly situated" would be found by the court to be in contempt. Appended to the filing submitted by the DeKalb County Board of Education is a newspaper article titled, "Principal questions judge's authority in prayer lawsuit." Also appended to that filing is a Letter to the Editor over principal Gary Carlisle's[11] signature which makes plain that Mr. Carlisle believes that only elected officials, and not the judiciary, may traffic in the First Amendment's religion clauses.

Mr. Carlisle's very recent letter states, "I will resist government without representation" in obvious reference to the judiciary and judicially imposed proscriptions on state-sponsored prayer. The court finds the Carlisle letter suggestive of a motive to violate the court's orders and to

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[11] There is confusion as to the spelling of this school principal's name throughout the record. Mr. Chandler has spelled it "Carlyle," counsel for DeKalb County has spelled it "Carlyle," the reporter for the Fort Payne Times Journal spelled it "Carlyle," and the "Letter to the Editor" submitted to the court is signed "Gary Carlisle, Principal, Sylvania High School." It is apparent that all parties refer to the same individual and identify him as the principal of Sylvania High School.

continue with the status quo of unconstitutional conduct in DeKalb County public schools. (Nor is this the only such press clipping with which the court has been deluged in this case.) The court can discern in this evidence no recognition of the wrongfulness of school-sponsored religious activity, sees scienter in the vow to "resist" judicial action, and discerns no repentance of past unconstitutional conduct. The court does not mean to single out Mr. Carlisle for censure. The court finds this statement emblematic of DeKalb County school officials' historical attitudes – judging from the record before the court, this statement typifies an attitude. The court references it specially because it is so recent.

The court also finds relevant that in Spring 1996, all Parties executed an agreement that DeKalb County schools would not undertake any practices alleged by the Plaintiffs to be unconstitutional pending this court's determination of their constitutionality. This agreement, styled "Joint Motion to Vacate This Court's Order and Agreement of Voluntary Cessation of Certain Activity Pending this Court's Decision" (hereafter "Joint Motion"), was filed with the court in March 1996.

That document, in the court's view, constitutes a representation of the parties *to the court*, even if the court could not or would not enforce a voluntary agreement

among counsel as Plaintiffs requested.[12] However, the fact that the DeKalb County School Board would represent to the court and other Parties that challenged conduct would cease pending the court's final determination -- and then continue with such conduct -- persuades the court of the pervasiveness of school-sponsored religious activity in DeKalb County and concomitantly, of the need to assure that injunctive relief can be enforced that will be effective to deter unconstitutional conduct in the future. Had the parties not made that agreement, the court would have proceeded with dispatch on the Plaintiffs' motion for preliminary injunction[13] and would have enforced any

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[12] The court notes that as a matter of law, voluntary cessation is not a defense to unconstitutional conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction may abate if there is no reasonable expectation the alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of the alleged violations. *Hall v. Board of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. Unit B 1981). The court concludes that this is plainly not the case here and that violations have continued to occur during the pendency of this lawsuit.

[13]The court had initially consolidated the preliminary injunction with the hearing on the merits. The Defendants' action had the effect of forcing forbearance of the hearing on the Plaintiffs. At the Parties' request, in the terms of the Joint Motion the court vacated its Order setting an immediate hearing on the merits and set a trial date. In the interim, dispositive motions were filed as to issues specific to DeKalb County and the parties agreed to submit the facial challenge to the statute on briefs. (*See* Order of February 28, 1996 vacating

orders pursuant thereto. Those orders would have been consistent with the court's March 1997 Opinion and Order on the constitutionality of Alabama Code § 16-1-20.3, finding that the statute violated both the Free Exercise and Establishment Clauses under the precedential cases.

The Joint Motion promised that the school board Defendants, the DeKalb County Board of Education, and the Talladega City School Board, would cease:[14]

> "prayers, whether student-initiated or otherwise, at school-sponsored sporting events that use public address systems;"
>
> "prayers and devotionals, whether student-initiated or otherwise, at school-sponsored assemblies, held during the school day. . . except that noncurricular clubs may meet

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hearing date.)

[14]Both Governor James and then-Attorney General Sessions disavowed any knowledge of the actions of school officials in DeKalb County in the Joint Motion. The Governor asserted therein that "he is not able to determine what activities may have heretofore been engaged in by other defendants, *i.e.*, school officials or agents and school boards." The Attorney General asserted that the activities in DeKalb County were "purely local in nature." (Joint Motion, ¶¶ 4, 5.)

during noninstructional time;"

"prayers and devotionals during classroom time during the school day; except that students have the right to pray, individually and nondisruptively, except when required to be actively engaged in school activities, *e.g.*, students may not decide to pray just as the teacher calls on them;"

"distribution of religious literature, including Bibles and invitations to religious events, to students by school officials or non-school persons during the school day on school premises; however, students and non-school persons have the right to distribute religious literature on school premises during noninstructional time, subject to the same reasonable time, place and manner restrictions imposed on the distribution of all non-school literature;"[15]

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[15]The absence of any policy of general applicability in DeKalb County public schools as to time, place, and manner restrictions is admitted by Weldon Parrish in his affidavit executed October 30, 1996.

> "prayers and devotionals, whether student-led or otherwise, at school-sponsored graduation ceremonies;"
>
> "the meetings of student Bible clubs, including the meetings of the Fellowship of Christian Students, occurring during instructional time; however, all noncurricular student clubs may be allowed to meet pursuant to the Equal Access Act during noninstructional time."

(Joint Motion, ¶ 6 and subparts.)

In exchange for this agreement not to do what was sued on here until the court ruled on the Plaintiffs' constitutional challenge, the Plaintiffs voluntarily "agree[d] not to seek preliminary injunctive relief in reliance upon defendants' agreement to cease the activities. . . pending a determination of their constitutionality." (Joint Motion, ¶ 8.)

Plaintiffs' "reliance upon defendants' agreement to cease the activities" was not misplaced as to the Talladega City Defendants. The Plaintiffs brought no complaint to the court concerning Talladega's performance on its promise to them and its representation to the court. The Plaintiffs' claims against the Talladega Defendants were

resolved through a consent decree, over the objections of the Governor and the Attorney General which both the Plaintiffs and the Talladega Defendants urged the court to overrule in both separate and joint filings. There have been no complaints of violations of that consent decree.

In contrast, the Plaintiffs have produced a mound of evidence of DeKalb County's breaches of the Joint Motion, which indicates to the court DeKalb County's predisposition to break promises. The court assigns weight to this, not because it has any inclination to enforce the terms of a voluntary agreement among counsel, but because it persuades the court of the depth of resistance toward ceasing unconstitutional practices on the part of the DeKalb County School Board and of the pervasiveness of school-sponsored religious practices in DeKalb County, that do not cease despite express agreement, the pendency of a lawsuit, and the court's earlier March 1997 Opinion and Order. If DeKalb County school officials persist in conduct alleged to be unconstitutional while this suit is pending and despite their promise not to persist, this court could not expect its Orders to be obeyed, any more than the Eleventh Circuit and the United States Supreme Court have been obeyed, absent an enforceable enjoinment of specific practices that are demonstrably violative of law.

Shortly after the Joint Motion was signed, Michael

Chandler tendered a Declaration informing the court that he attended the 1996 commencement at Sylvania School and witnessed a "Historian Address" delivered by a student that ended, "In His name we pray, Amen." Exhibit A to that Declaration is a copy of the Sylvania School program on which is printed an entry for "Historian Address." Mr. Chandler also submitted copies of the programs for various other commencements in DeKalb County public schools which list invocations and benedictions given by students and copies of the programs for various other assemblies and school-sponsored events which indicate that devotions were given. Several of these documents show that DeKalb County public schools printed the commencement and baccalaureate services on the same program and that school principals took part in the baccalaureate services by way of introducing ministers. (All of these documents have been authenticated by the DeKalb County School Board in the discovery process.)

Mr. Chandler also testified in that Declaration that a Bible reading was given by a student at a compulsory assembly at Fyffe High School while Jesse Chandler was in attendance. Mr. Chandler testified in this Declaration that he complained to the principal of Fyffe School about violations of the Parties' agreement and was told in response that the principal knew nothing about the Joint

Motion and that he had not been informed by the DeKalb County Superintendent's office of the Parties' agreement. Other evidence in the record indicates that an individual school board member, Willard Israel, indicated not only that he would not comply with any agreement, but that the agreement was a matter between the attorneys and not the Parties. (Ex. B to Pls.' Supp. to Mot. for Sanctions and Opp. to DeKalb Defs.' Req. for Time.) DeKalb County has never challenged the Plaintiffs on any of these matters or offered any evidence to contravene Mr. Chandler's testimony as to the matter of the Bible reading/student devotional at Fyffe and school officials professed ignorance of, the terms of the Joint Motion.

Mr. Chandler offered a further Declaration dated November 10, 1996, in support of the Plaintiffs' November 21, 1997 Motion to Enforce the Joint Motion. A videotape made by Mr. Chandler depicting (among other things) prayer over the public-address system at a Geraldine High School football game on October 19, 1996 was submitted as Exhibit B to the Declaration dated November 10, 1996.[16] The court has viewed the videotape, and considers

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[16]That videotape also shows student-led prayer over the microphone at graduation. It is of poor quality, but it is clear what is depicted. Mr. Chandler testified in his Affidavit of February 1 that he had videotaped graduation prayers and pre-game prayers prior to the

it powerful evidence of DeKalb County Schools' defiance of Eleventh Circuit law as pronounced in *Jager* almost a decade ago as well as evidence of DeKalb County's disregard for the proceedings pending here. The videotape features one of the intervenors,[17] a minor at Geraldine High

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filing of this lawsuit.

The court reiterates that there are two videotapes, one including pre-suit graduation exercises and pregame prayer in a series of short clips and ending with the October 19, 1996 prayer over the public-address system by Ms. Sexton at Geraldine High School, and the other depicting the 1997 graduation prayer at Collinsville, Plainview, and Sylvania as well as classroom prayer at Geraldine. The videotape filed November 21 with the Motion to Enforce includes the pre-suit graduation prayer as well as the post-suit October 1996 football game prayer. The first videotape is Exhibit B to the Plaintiffs' Motion to Enforce; the second, showing the 1997 graduation prayers, is Exhibit B to the June 9, 1997 Declaration of Michael Chandler. (*See* Affidavit of Michael Chandler, Feb. 1, 1996, at ¶¶ 6, 9; Plaintiff Michael Chandler's Designation of Exhibits and Materials already in the Record for Rule 56 Purposes, n.4 (filed November 21, 1996).)

[17]The intervenors were allowed in for the limited purpose of *amicus curiae* participation. The court accepted affidavits from them. Had they intervened timely, when this suit was filed or before summary judgment submissions and the court's March 1997 opinion, the court would have granted intervention. The intervenors' affidavits do not merit separate or extended discussion. Bible Clubs may meet consistent with the Equal Access Act; religious jewelry may be worn; students may wear "Victory Line" t-shirts of the sort depicted in Exhibit C to Plaintiffs' Opposition to Motion to Intervene or in the Alternative, Motion to Strike, consistent with school policy; students may organize the "Meet Me at the Pole" event; and may generally do

School, leading the prayer and discussing her action with the news media. (*See also* Exhibit C to Plaintiffs' Opposition to motion to Intervene.)

Mr. Chandler's November 10, 1996 Declaration also indicates that devotionals took place in elementary schools after the Joint Motion was signed and that Bible Club students at Valley Head High School were excused from class on May 24, 1996 to distribute information about baccalaureate services to each classroom. Mr. Chandler also testified that members of the band were required to attend the baccalaureate service at Valley Head High School. Additional programs from 1996 school graduations were appended as exhibits to this Declaration. Programs showing the same practice before the filing of this lawsuit were appended to the Complaint, and the Plaintiffs had alleged their illegality. Even under scrutiny as to these practices, school officials in DeKalb County did not desist.

Yet a further Declaration Under Penalty of Perjury, executed June 9, 1997, was tendered by Mr. Chandler describing events at May 1997 graduation ceremonies and

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all the things the court discussed at pages 23 and 24 of its earlier opinion -- and more. This court does not undertake to give a complete catalog of possible free exercise rights. The intervenors' position is apparently that the Free Exercise Clause negates the Establishment Clause. The court has already rejected that position.

prayer in the classroom at Geraldine School. Once again, some of these events were captured on videotape.[18] The videotape shows that there definitely is prayer at the Plainview High School graduation in the manner in which Mr. Chandler's June 9, 1997 Declaration describes it. In addition, the court has observed that there definitely is prayer at a graduation ceremony which ends by invoking the name of Jesus, as ¶ 3 of the Declaration recites regarding Sylvania High School.

At Sylvania High School, Mr. Chandler testified in this Declaration, "Just as occurred last year under the guise of a 'Historian Address,' as I swore in my previous Declaration, the 'Greetings' by the class 'historian' were explicitly a prayer. The 'historian's' prayer ended in Jesus' name and was offered over the public-address system. Gary Carlyle, the principal, was seated in close proximity at the time of the prayer, as the videotape accompanying this Declaration depicts. I believe that the phrase 'historian

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[18]The prayer in the classroom, according to the Declaration of the reporter who observed and filmed the classroom prayer which has been submitted to the court on videotape, was in the sixth-grade classroom prior to the lunch period. Jim Melchiorre's Declaration establishes that the teacher announced lunch and the students stood, recited the Pledge, and prayed *en masse*. Mr. Melchiorre testified that he was told by student/intervenor Leslie Sexton to go to this particular classroom to film.

address' or the designation of a student as 'historian' is Sylvania's code for prayer at graduation." This lawsuit was pending at the time of both the 1996 and 1997 Sylvania graduations described.

Mr. Chandler further testified in his June 9 Declaration that at Collinsville High School in May 1997, for example, he witnessed both a benediction and an invocation. He testified that at Plainview High School, a student walked to the microphone to announce an invitation to prayer and walked away from the microphone to lead the prayer during the time listed on the school program as the "Special Music" segment of the ceremony. At Valley Head High School, he testified, a student recited the Lord's Prayer.

Once again, the June 9 Declaration was accompanied by various programs from various ceremonies evidencing benedictions, invocations, and baccalaureate exercises listed on the same program as the graduation exercises, just as was the affidavit that accompanied the Complaint.

In the June 9 Declaration, Mr. Chandler also testified that Jesse Chandler has been harassed by schoolmates at Fyffe School:

> Fyffe School students are led to lunch every day and cannot leave the campus for lunch;

the school has a closed-campus policy. In approximately October 1996, Jesse began experiencing harassment in the lunchroom. I am aware that the agreement signed by my lawyer and DeKalb's lawyers states that school officials will intercede to stop harassment based on religious belief.[19] Virtually every day between October 1996 and April 1997, approximately 175 out of 200 students in the lunchroom stood up and prayed aloud when Jesse entered the lunchroom. On one or more occasions, a student would announce on Jesse's arrival, 'one, two, three, pray.' I discussed this situation about two weeks after it started happening with principal Danny Ashley, who admitted to me that this was occurring in systematic fashion.

I also complained to Superintendent Parrish. Both Ashley and Parrish told me that lunch time was noninstructional and students could do whatever they want. I do not challenge the right of small groups of students or

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[19]*See* Exhibit A to Joint Motion.

individual students to pray nondisruptively at lunchtime. However, a mass, audible prayer offered specifically because my son has entered the lunchroom is in my view harassment that school officials should intercede to stop, particularly in view of the captive- audience problem. DeKalb County agreed that its school officials would intercede to stop harassment based on religion and has not done so despite my requests and the requests of my counsel.

. . . I do not want my son harassed every day in this way and for school officials to shirk their duty to stop the harassment. The students' behavior has been organized and vindictive. In April, I told Jesse to take his lunch to my wife Barbara Chandler's classroom and to eat his lunch there to escape the harassment. I did so around the time that Jesse told me that the students were going to offer a Bible reading at lunch because they had heard I was going to be on campus that day. Technically, what I told my son to do is a violation of school policy, because he is supposed to be in the

> lunchroom during the lunch period. However, I felt that I must do something to prevent his being further stigmatized based on this lawsuit.

Two further Declarations of Mr. Chandler were submitted to the court in September 1997, during this school year. One, as amended, establishes that Mr. Chandler witnessed a prayer over the public-address system at a football game with the school principal in attendance. The second September 1997 Declaration offers testimony that at Valley Head High School, on September 12, 1997, the public-address system was used at a high school football game for announcing that "'a couple of moments of prayer' would be had following the National Anthem."

All of these activities took place or continued to take place after the court had issued its March 1997 opinion and Order, which makes express reference to the Eleventh Circuit's specific proscription of prayer over the public-address system in *Jager* at pages 9 and 10.

There is further evidence in the record predating the court's March 1997 Opinion and Order. In his affidavit submitted with the Complaint, Mr. Chandler testified that the 1995 DeKalb County graduation ceremonies and other

year-end activities included prayers and devotionals. Mr. Chandler testified in this affidavit that Crossville High School used clergy for this purpose; Exhibit 1 to this affidavit demonstrates that the Reverend Bob Coleman gave an invocation and benediction at Awards Night May 18, 1995 and that the Reverend Wes Garner gave an invocation at graduation. A Plainview School Announcement is discussed in Mr. Chandler's affidavit and is Exhibit 2 thereto; Mr. Chandler testified that students were excused from class to attend baccalaureate practice in May 1995. Exhibit 2 states, "May 19 - 3rd period - (Friday) - BACCALAUREATE PRACTICE - This will take only one period. You will have regular classes 4, 5, 6, 7 periods." Exhibit 2 also indicates that senior-class members should get any materials for inclusion on the graduation program, such as "singers, songs, prayers" ready for submission to the printer of the school's graduation program.

Exhibits 3, 4, 5 and 6 to the affidavit, all from May 1995 before the lawsuit was filed, demonstrate that the religious service is listed with the graduation program -- just as was the case after the lawsuit was filed in both 1996 and 1997. The court finds that the pending lawsuit made no difference to this intermingling of the private religious service with the school-sponsored graduation ceremony;

the practice was the same in 1995 as in 1996 and 1997.

Mr. Chandler testified in his February 1, 1996 affidavit, "Since 1985, through the Fall of 1995, I have witnessed pre-football game prayer at Valley Head, and at Geraldine, Fyffe and Plainview games." (Apparently, Mr. Chandler was complaining about this practice even before the Eleventh Circuit had issued a ruling directly on point.) Mr. Chandler testified in this affidavit that Superintendent Weldon Parrish had told him that prayer at school football games was a tradition that would not be stopped. Mr. Chandler attached to his affidavit as Exhibit 7, an August 2, 1989 newspaper article quoting Superintendent Parrish as stating that school principals could have prayer over the loudspeaker at high school football games if they wished, in accordance with tradition, despite the Eleventh Circuit's ruling to the contrary. In ¶ 20 of its Amended Answer, the DeKalb County Board of Education admits that Superintendent Parrish had referred to prayer over the public-address system at high school football games as a tradition.[20]

Mr. Chandler testified in his affidavit that he wrote a letter of complaint to Superintendent Parrish on August

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[20]The court notes that "tradition" contemplates ongoing, repetitive conduct.

3, 1989 regarding the newspaper article of August 2, 1989 and the quotations attributed to school officials: The letter expresses Mr. Chandler's concern that school officials had expressed that they would disobey the law and asks Superintendent Parrish to "consider adopting [a] board policy stating that all employees will obey the law and respect the differences in religion that exist in this country." That letter is appended as Exhibit 9 to Mr. Chandler's affidavit and is authenticated in his affidavit. Mr. Chandler testified in his affidavit that he received no response. In their Amended Answer, ¶ 20, the DeKalb County Defendants "admit plaintiff Chandler wrote to Superintendent Parrish and the DeKalb County School Board expressing his concern over school sponsorship of religious activities." They also admit the "remaining allegations" of paragraph 20, which include the allegation that Mr. Chandler received no reply to his letter of complaint.

All of this undisputed evidence about events and practices before this lawsuit was filed, as well as the undisputed evidence of ongoing school-sponsored religious activities after the Parties made representations to the court through filing their Joint Motion and after the court's March 1997 Opinion and Order, indicate to the court that injunctive relief is necessary. DeKalb County

has disregarded its representations to the court and the Plaintiffs, has ignored the obvious import of the court's March 1997 Opinion and Order, and has continued, in action repetitive of or similar to conduct before the lawsuit was filed, to: (a. permit mass vocal prayer in the classroom at Geraldine School, when the teacher announces the lunch period; (b) use the public-address system to deliver prayer and to call for prayer prior to high school football games at several schools; (c) offer student-led prayers at graduation ceremonies, among them prayers presented in the guise of "historian addresses" two years in a row; (d) offer student-led prayer at graduation that is decidedly Christian and therefore sectarian; (e) intermingle private religious service with official graduation exercises; and (f) refused to halt harassment based on religion where they have notice of it and to take effective action to deter violations by students, school officials, and nonschool persons.[21] The conduct is certainly recurrent, and almost certain to remain so absent an injunction.

This court has been besieged by motions and requests for clarification of its March 1997 Opinion and Order, which the court thinks sufficiently clear not only as to the court's ruling that Alabama's most recent school-prayer statute is facially unconstitutional, but as to all the case law demonstrating why that is so that has been

controlling for some time. This court indicated in its March 1997 Opinion and Order that it rejected the Fifth Circuit's rule on student-initiated graduation prayer as inconsistent with *Lee v. Weisman* and with the Eleventh Circuit's holding, rationale, and opinion in *Jager v. Douglas County*. As recently as October 23, 1997, DeKalb County again requested "clarification" from the court as to whether the federal court "has the authority to tell school officials in DeKalb County how to handle the issue of school prayer."

Finally, the court notes that Plaintiffs have represented in several filings that they have on several occasions proffered a consent decree to the DeKalb County Defendants. (*See*, e.g., Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time, ¶ 3 & n.3.) The DeKalb County Defendants have consistently taken the position that the Plaintiffs' challenges to their specific practices would be mooted by the court's ruling on the statute. The DeKalb County Defendants' discovery responses take the position that challenged conduct was undertaken pursuant to the statute. (*See* DeKalb Defendants' Answers to Plaintiffs' First Set of Interrogatories, Responses 5, 9, 11 and 12, responding "Yes" to interrogatories inquiring whether this conduct; including a teacher's asking for student volunteers to pray

was "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions.") The DeKalb County Defendants argued that summary judgment should be denied because the court's opinion on the statute would moot most if not all issues as to them. In other words, DeKalb argued that a facially unconstitutional statute would not shield it from constitutional violations avowedly undertaken pursuant to it, and that a ruling of facial invalidity would necessarily mean that myriad activities undertaken under the statute were unconstitutional. Accordingly, when the court struck the statute, it ordered DeKalb County, in conformity with, DeKalb County's own expressed views, to sit down with the Plaintiffs and attempt resolution of nonfacial claims.

The response to court-ordered settlement discussions between the Plaintiffs and DeKalb County was still rejection of any settlement despite DeKalb's own argument that a facial ruling would be dispositive of other claims. It is apparent to the court from the evidence, and even from recent DeKalb county filings, that unconstitutional conduct will not be *willingly* stopped by elected school officials. The court notes this not to chide, but by way of explaining why it believes that DeKalb County school officials are unlikely to take steps to cause popular, but illegal, activity to cease. The court thinks it

apparent from the long history of pregame prayer, from the admission that Superintendent Parrish believes it to be a tradition, and from the recent necessity of a conference call to discuss a high school principal's expressed views (at the request of his counsel on the representation that clarification of the March 1997 Opinion and Order was necessary), that court-ordered terms are the only means of relief.

If DeKalb County has specifically contended throughout this litigation that student-initiated prayer at football games, assemblies and events, and at graduations was done pursuant to the statute, and this court ruled in March 1997 that the statute was unconstitutional, at a minimum, this conduct pursuant to the statute should have ceased.

Where the court finds that state officials are unlikely to enforce the terms of a state statute that has been struck, it may order only declaratory relief and withhold injunctive relief.[21] Here, however, officials flagrantly defied the Eleventh Circuit rule on prayer over the public-address system and continued to do so after this lawsuit was filed. Here, even after this court's March 1997 0pinion

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[21]*See* Exhibit A to Joint Motion; footnote 16 of court's March 1997 Opinion and Order.

and Order, "student-initiated" prayer continued with the use of the school facilities and in particular the public-address system.

In view of the history of pervasive religious activity in the schools operated by the DeKalb County School Board, the court determines that an injunction of the DeKalb County School Board is necessary. It is not in every jurisdiction that one hears of organized, school-sponsored prayer in the classroom more than three decades after *Schempp* and *Engel*. Yet here, according to DeKalb's own discovery responses. stipulations, and Amended Answer, Jesse Chandler's teacher Ms. Carroll "may have selected devotionals for students to read," "asked for volunteers to lead prayers," and permitted prayer. (Stipulation 46; Amended Answer, ¶ 16.)[22] Moreover, after this lawsuit was filed, classroom prayer at Geraldine School has been videotaped, and the manner in which it proceeds is upon the teacher's announcement of the lunch period. (*See* Affidavit of Jim Melchiorre.) The manner in

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[23]Admissions such as these support Plaintiffs' argument in their briefs that ostensibly "student-initiated" activities hazard the possibility that school officials will simply delegate religious activity to students, who act as their surrogates. On this basis alone, in conjunction with evidence such as this, a court could strike the statute or the practice under *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

which it proceeds is out loud and in unison.

In view of this and the above, the court finds that the monitoring it orders by its injunction is appropriate and necessary. It has been demonstrated to the court's satisfaction that simple declaratory relief would, in DeKalb County, be no relief at all.

The court further finds that in-service training is warranted as a necessary component of injunctive relief. The evidence in the record indicates that school officials apparently see no error in failing to curtail organized classroom prayer; in allowing the public-address system to be used for prayer at school-sponsored sporting events; in allowing not only student-initiated prayer at graduation, but allowing explicitly Christian prayer at graduation ceremonies; and in failing to adopt a policy of uniform applicability for distribution of materials by nonschool persons that would have obviated the need of the court's ordering them to do so, even though the court admonished DeKalb County at the pretrial conference that the absence of such a policy is a serious matter. All of these things suggest to the court a disregard for the rights of students and parents who might not be members of the majoritarian religion or who might believe that the United States Supreme Court has correctly held for decades that the state

may not favor religion, even over-nonreligion.[24]

Most importantly, the court is disturbed by the uncontroverted testimony regarding Jesse Chandler. Even if Michael Chandler's November 10, 1996 Declaration testifying that all students are required to attend homeroom periods and that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission were controverted, this court still could not find that the lunchroom situation described in the June 9, 1997 Declaration at Fyffe School could continue. The court repeats what it said in footnote 16 of its March 1997 Opinion and Order: disruptive, aggressive, harassing speech by students, even in the lunch setting, is not protected. Michael Chandler's testimony that both the school principal and Superintendent Parrish had notice of the situation and replied that lunch time was "noninstructional" time so they would not intercede convinces the court of the need for brief, one-time-only, in-service training.

The court, by the terms of its injunction, leaves the selection of the curriculum to DeKalb County subject to

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[24]*See County of Allegheny*, 492 U.S. at 590-91; *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

the court's approval. While the court has suggested a program, its suggestion is for illustrative purposes only and the court would approve any reasonable program of neutral and objective content. All of the matters discussed above, as well as the matters discussed below with reference to the Plaintiffs' dispositive motions, demonstrate to the court that a one-time, in-service training would be of great benefit in clarifying the law for those who must abide by it. The court does not require such in- service training repetitively or for all new hires but requires merely that educational materials be maintained in a form accessible to persons who are hired after the court-ordered in-service training is conducted.

The court finds that this injunctive relief will clarify the law for agents of the DeKalb County School Board and that general instruction in the tolerance of religious diversity that underlies the Establishment Clause's proscription of religious favoritism is necessary and is frankly responsive to DeKalb County's oft-requested pleas for more clarification of the court's March 1997 Opinion and Order. The court expects such training to assist school officials in complying with the injunctive provision regarding school officials' treatment of situations such as Jesse Chandler's lunchroom incident.

The court finds that its provisions for publicizing its

injunction are reasonable and not onerous.

The court finds that the nonharassment provision is a general aspect of injunctive relief in cases such as employment discrimination, where Defendants often control the destiny of suing employees and of their witnesses. The court finds the present situation analogous. The court finds that specific provision is warranted as to Jesse Chandler particularly by the fact of Jesse Chandler's experience at Fyffe School. The court finds that specific provision as to Mrs. Whiteside is likewise warranted due to gratuitous references in briefs and affidavits. The references in Donna Taheri's affidavit and Steve Bowman's affidavit, for example, appear to the court to suggest that these persons, DeKalb County Board of Education employees, have formed the opinion that Mrs. Whiteside is opposed to school prayer and therefore "trapped" Mr. Bowman into singing a gospel song at a school-sponsored assembly by requesting that he sing a song.

As to all references to Alabama Code § 16-1-20.3 and any regulations implementing it, the court reiterates its conclusion of March 12, 1997 that the statute is unconstitutional as measured against both the Free Exercise and Establishment Clauses. The court expressly found that "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"

as referenced in the statute ran afoul of the test of *Lemon v. Kurtzman*, 403 U.S. 602 (2971). The court found state sponsorship and endorsement of religion in students' undertaking prayer, invocations, or benedictions using the state's facilities and machinery. Certain conclusions obviously flow from that; one is that conduct that fits the description of the unconstitutional statute is similarly unconstitutional. The court expressly so finds.

B. Evidence And Conclusions Upon Dispositive Motions

The court now focuses on the evidence specifically related to dispositive motions in this case, to the exclusion of evidence of continuing violations of law past the time of the filing of those motions, that the court has reviewed above and which demonstrate to the court that declaratory relief alone would be insufficient.

The court notes again that the DeKalb County Defendants have responded to Plaintiffs' interrogatories about devotionals at D.A.R.E. assemblies; faculty solicitation of student volunteers to lead classroom prayer; devotionals over the intercom; and graduation invocations by students, with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants Requests 5, 9, 11, 12, DeKalb

Defendants Answers to Plaintiffs' First Set of Interrogatories, "Yes" to Requests 5, 9, 11, 12.) The court notes again that it was DeKalb County's position at summary judgment that the court's ruling on the statute would resolve most of these challenges -- the court finds that the only exception to this position taken by DeKalb County exists with regard to Gideon Bible distributions.

The court has reviewed the Parties' final filings in response to the court's April 24, 1997 Order from the bench as an aid to its findings, but these filings are aids only and may not reflect all admissible evidence. Findings follow:

Stipulations resolve some issues.[25] Thus the court

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[25]The court notes that its Order to the Parties to stipulate to such matters as they could among themselves, apparently produced delay and confusion due to the multiplicity of Parties. In ordering the Parties to stipulate to matters as to which admissions and agreement could be made, the court intended for Parties to use their common sense as to deciding to which Parties a given stipulation is obviously addressed. The court relies on stipulations between the Plaintiffs and DeKalb County for all matters directly affecting DeKalb County and factual allegations specific to it. The court notes that the Plaintiffs have not attempted reliance or attributed any evidentiary significance to the filings of the Governor in this regard. Nor does the court, which finds that the Governor may not contravene or qualify the Stipulations of DeKalb County by means of his own stipulations. The court notes that stipulations would be meaningless as among Parties intending to be bound by them if other Parties could effectively veto them.

finds "[p]laintiff Michael Chandler is a resident of DeKalb County, Alabama and is the father of Jesse Chandler, a seventh-grade student born in 1983, who attends Fyffe School." (Stipulation 1.) The court further finds that "plaintiff Michael Chandler is an employee of the DeKalb County Board of Education who works at Valley Head School, where he teaches class and serves as assistant principal and as guidance counselor. In this capacity, plaintiff Michael Chandler is required to attend various school-related activities and events, including school-related student assemblies, compulsory and non-compulsory school-related sporting events, school-related graduation or commencement ceremonies and other school-related student events." (Stipulation 2.) The court further finds that Michael Chandler is required to attend home football games in his capacity as assistant principal at Valley Head High School. (Amended Answer, ¶ 19.) The court further finds that "[i]n his capacity as assistant principal at Valley Head, Michael Chandler is required to attend graduation/commencement ceremonies at the school." (Stipulation 56.)

The court finds that "[t]he DeKalb County Board of Education operates all public schools within DeKalb County, including Valley Head School, Plainview School, and Fyffe School, which schools have students in grades K

through 12." (Stipulation 15.)

The court finds that "[a]ll DeKalb County high school home football games or other athletic events take place under the general direction or control of the DeKalb County Board of Education, with individual games occurring under the immediate supervision of each home-team principal. All home football games and other athletic events take place on public school-owned or leased property. Public school officials or their agents control access to the public-address systems at all football games or other athletic events, including granting permission for its use." (Stipulation 51.) The court finds that "[i]n 1994 and 1995, prayers and devotionals, as well as the Pledge of Allegiance, have been offered over the public-address system by students and clergy at DeKalb County high school football games." (Stipulation 53; *see also* Stipulation 55.)

The court finds that "graduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation 58.) The court further finds that "[t]he graduation/commencement ceremony is considered an integral part of the school educational program and of each student's tenure at school. Graduation/commencement

ceremonies are community-wide events frequently attended by non-graduating students." (Stipulation 60.)

Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement, filed November 21, 1996, is a videotape accompanied by a Declaration under Penalty of Perjury of Michael Chandler executed November 10, 1996. The videotape depicts graduation prayer over the public-address system filmed by Mr. Chandler which occurred prior to the filing of this lawsuit and also depicts pre-game prayer over the public-address system at a Valley Head football game that occurred prior to the filing of this lawsuit, on September 1, 1994, according to the uncontroverted affidavit of Michael Chandler. (*See and compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer

at Valley Head High School").)[26]

The court finds that the evidence is uncontroverted that "over the past year,[27] students have lead [sic] the crowds in prayer at certain high school football games in DeKalb County over the public-address system." (Amended Answer of DeKalb county, ¶ 18.) Specifically, Mr. Chandler testified in his February l, 1996 affidavit that prayer occurred from 1985 through 1995 at his "home" school of Valley Head, as well as at Geraldine, Fyffe, and Plainview games. In Stipulations 53 and 55, DeKalb County admits that such prayers over the public-address system have been had. In addition to the admission in DeKalb County's Amended Answer, the court relies upon Stipulation Numbers 51 and 53, in which it is admitted that

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[26]Exhibit B to the Plaintiffs' Motion to Enforce further depicts a pre-game prayer that Michael Chandler has testified occurred on October 19, 1996, after this lawsuit was filed. (*See* and *compare* Aff. of Michael Chandler, ¶¶ 6, 9; Ex. B to Plaintiffs' Motion to Enforce, Nov. 21, 1996; Plaintiffs' Designation of Exhibits filed Nov. 21, 1996, n.4; Compliance with Court's Order from the Bench of April 24, 1997 to Point out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff ("Exhibit B to Plaintiff's Motion to Enforce, filed November 21, 1996, shows Leslie Sexton, Geraldine High School Student Council President, leading the prayer over the public-address system at an October 1996 football game and also shows a September 1994 pre-game prayer at Valley Head High School").

[27]Meaning the year preceding filing of the lawsuit.

the DeKalb County Board of Education, and also school principals, have immediate supervision and control over "home" athletic events and the public-address system and admitted that prayers and devotionals "by students and clergy" were offered in 1994 and 1995 over the public-address system.[28]

The court notes that the DeKalb County Defendants,.in their Amended Answer, "admit the first sentence of paragraph 22." The first sentence of paragraph 22 of the Complaint alleges that "[t]he graduation services held in each of DeKalb County's eight high schools

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[28]The court concludes that *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (1989), *cert. denied*, 490 U.S. 1090 (1989), is totally dispositive of the prayers delivered over the public-address system, regardless of whether student- or clergy-led. "When religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so). Pursuant to *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this is a message that the school may not convey. *See also Jager*, 862 F.2d at 832 (stating that persons of any age may find that state endorses religion and specifically religion believing in prayer thereby denigrating the beliefs of others in violation of Establishment Clause where the school's facilities are used for prayer.

regularly incorporate religious invocations and/or benedictions." The DeKalb County Board of Education has not denied the allegations of paragraph 22 of the Plaintiffs' Complaint, with reference to invocations and benedictions generally and to clergy-led prayer at Crossville High School. The court finds that in May 1995, a prayer at the graduation ceremony of Crossville High School was led by the Reverend Bob Coleman. (Exhibit 1 to February l, 1996 Affidavit of Michael Chandler; Complaint, ¶ 22; Amended Answer, ¶ 22.) The court finds that an invocation was given by student Heather Elaine Clowdus at Plainview High School May 26, 1995 and that an invocation and a benediction were given by students Chad Willis and Zack Smith at Collinsville High School's May 1995 commencement. (Exhibit 3 to February l, 1996 Affidavit of Michael Chandler.) An invocation was also given at the May 1995 Fyffe High School commencement by a student. (Exhibit 5 to February l, 1996 Affidavit of Michael Chandler.) Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. The DeKalb County Defendants contend in this lawsuit that student-led graduation prayers are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (Plaintiffs' First Discovery Request to Defendants, Interrogatory 9; DeKalb

Defendants' Answers to Plaintiffs' First Set of Interrogatories, Response to Interrogatory 12.) The court finds this to be expressly true of the May 1995 Valley Head student invocation addressed by Stipulation 63 and Plaintiffs' Interrogatory 12 and that DeKalb's response extends to "such prayers" elsewhere.

The language is that of Alabama Code § 16-1-20.3, and DeKalb has contended throughout this lawsuit, at summary judgment and elsewhere that it has permitted such conduct under the auspices of the statute. There is no evidence to the contrary in the record. The court finds that the Plaintiffs and DeKalb County have stipulated to the fact that "[g]raduation/commencement exercises are school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (Stipulation Number 58. *See also* Amended Answer of DeKalb County, ¶ 21.) The court finds that the Defendants admit that the May 1995 Crossville High School graduation featured a clergy-led invocation. (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.)

Exhibit B to the Plaintiffs' Motion to Enforce depicts various graduation prayers, as earlier stated. There is no evidence to the contrary in the record. The court further finds that the Defendants admit that the May 1995

Crossville High School graduation featured a clergy-led invocation.[29] (Amended Answer, ¶ 22. *See also* Exhibit 1 to February 1, 1996 Affidavit of Michael Chandler.) The court further finds that even if clergy-led prayer occurred but one time,[30] the DeKalb County Board of Education would have no defense to this constitutional violation.[31]

The court concludes that student-led prayer at graduation is unconstitutional as the court understands Eleventh Circuit law and Supreme Court precedents. The court has already declared Alabama Code § 16-1-20.3 unconstitutional. This federal district court does not judge it to be its province to adopt for Alabama a rule applicable to graduation prayer in another appellate circuit which does not include Alabama, especially where the court finds that

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[29]The clergy-led prayer is proscribed by *Lee v. Weisman*, 505 U.S. 577 (1992), even if nonsectarian.

[30]The court notes that it occurred in May 1995, after *Lee v. Weisman* was decided and after *Jones II* was decided in the Fifth Circuit. Even *Jones II* does not countenance clergy-led prayer.

[31]The United States Supreme Court and the Eleventh Circuit have held unavailing the argument of school boards that unconstitutional practices may be justified as "relatively minor encroachments on the First Amendment. The breach of neutrality [toward religion] that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832.

rule to be in direct conflict with *Lee v. Weisman* and inconsistent with *Jager* in our own Circuit. As the court stated in footnote 4 of its March 1997 opinion, "the Court believes that the decision in *Jones II*[32] is a departure from established Supreme Court precedent" and is "inconsistent with controlling Eleventh Circuit precedent." The court further noted in footnote 4 that *Jones II* rested on questionable legal conclusions, did not sweep as far as Alabama Code § 16-1-20.3, was "aberrational" among the existing Supreme Court and federal appellate cases, and was of limited relevance to the case before it.

The court concludes that *Lee v. Weisman* proscribes even indirect coercion by state officials to pray.[33] The court concludes that, whether pursuant to a statute mandating school officials to permit "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions"[34] or not, *Lee v. Weisman* teaches that the state, even when not officially delivering the prayer, may

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[32]The court refers to *Jones v. Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993).

[33]*Lee*, 505 U.S. at 599; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Abington Twp., Pa. v. Schempp* , 374 U.S. 203, 224-25 (1963).

[34]*See* Plaintiffs' Interrogatory 12 and DeKalb County's Response, "Yes."

be effectively coercing students who do not wish to hear or participate in prayer to do so by sponsoring prayer at graduation. Under *Lee*, the fact that attendance at graduation ceremonies is not required to obtain a diploma is irrelevant.[35]

In the Eleventh Circuit, pursuant to *Jager*, "when religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school- sponsored event at a school or facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."[36]

The court finds and concludes that commencement is "a school-sponsored event at a school or facility" as stipulated by the parties. Within the meaning of *Jager* in this context, such a "religious invocation conveys a message that the school endorses the religious invocation." The court finds that the United States Supreme Court made sufficiently plain in *Lee* that even nonsectarian prayer is

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[35]*See also Schempp*, 374 U.S. at 226; *Engel*, 370 U.S. at 430..

[36]*Jager*, 862 F.2d at 831-32. *See also Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth Cir. 1984) (finding no meaningful distinction between school officials themselves committing the Establishment Clause violations and permitting students to do so).

proscribed.[37]The court further finds and concludes that nothing in these cases interferes with, for example, a valedictorian's expressive right to make a brief reference to Deity in a valediction.[38] The court concludes that these cases touch in no way upon purely private, voluntary religious expression and that the proscription on school-sponsored prayer has no connection to prayer at baccalaureate services or similar events.

The court has, as noted earlier, examined all documents filed with the Affidavit of Michael Chandler of February 1, 1996, several of which consist of official, school-generated programs for DeKalb County commencement exercises as to which authenticity was admitted by the DeKalb Defendants in the course of discovery. (Defendants' Response to Plaintiffs' Request for

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[37]*Lee*, 505 U.S. at 588-89. Sectarian prayer is obviously proscribed by the Establishment Clause, as cases such as *Larsen v. Valente* make clear. Here, the court encounters the anomalous situation of a school board claiming that student-led prayers, some of which are explicitly Christian as depicted on videotape and according to uncontroverted testimony, are nonsectarian -- because the school board has claimed the statute authorizes the activity. Obviously, graduation services, as the Parties have agreed, are not private time; they are school-sponsored events. To that extent, audiences may not be led in sectarian prayers, either.

[38]*See In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

Admissions, numbers 1-12, filed in various pleadings including Compliance with Court's Order from the Bench of April 24, 1997 to Point Out Evidence Already in the Record Pertinent to Dispositive Motions Filed by Plaintiff.) Exhibit 3 to this Affidavit demonstrates that the baccalaureate service of May 21, 1995 was printed on the same program as the commencement exercise at Plainview High School and that Plainview principal Bob Gray introduced the baccalaureate service. Exhibits 5 and 6 to this Affidavit indicate that the Fyffe High School and Collinsville High School's 1995 commencements were printed on the same program as the baccalaureate services and that at Fyffe High School, principal Nelson Ellis introduced the baccalaureate service. The same is true of various 1996 programs authenticated by the DeKalb County Defendants as to programs doing double duty and showing involvement of school officials. (*See*, *e.g.*, 1995 program for Plainview High School showing that principal Billy Ray Morris participated in 1995 baccalaureate program, authenticated in response to Plaintiffs' Request Number 15; Plainview High School "Thirty-Seventh Commencement Exercises" (1995), showing that principal Gray participated in baccalaureate, authenticated in response to Plaintiffs' request Number 20.)

By this observation, the court does not mean to

imply that school officials may not *attend* baccalaureate functions, only that they should not, i.e., introduce ministers or lend the aura of school sponsorship to the private religious enterprise. They may not, likewise, as evidenced in Exhibit 2 to the February 1, 1996 Affidavit of Michael Chandler, excuse students from class for baccalaureate practice.[39]

Michael Chandler's November 10, 1996 Declaration stated that all students are required to attend homeroom periods and, that DeKalb County schools are closed-campus schools, so that students may not leave the campus during the school day without permission. Nowhere in the record is this testimony controverted in such a way as to rob it of legal relevance.

The court finds that instructional time is not, as urged by DeKalb County, all time not devoted to academic instruction. For purposes of the Establishment Clause, the court does not look to the curricular or teaching-hour

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[39]Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), state actions that fail any one of the three prongs of that test are unconstitutional. The commingling of the private religious commemoration, which is understood to be that, with school graduations is impermissible. School sponsorship, including excusing students from class for baccalaureate practice, is impermissible. The primary effect of such actions is to endorse religion and to convey the message that school officials favor religion.

requirements that an accreditation agency might look to; rather, it looks to whether children are required to be present during a particular time. The concern is with the captive-audience problem, not with pedagogical matters. Thus, when Fyffe School fifth-grade teacher Brenda Powell testified in her affidavit that the Gideon Bible distribution of which she spoke "did not take away from the instructional time," the court cannot ascribe legal relevance to that testimony. The court notes that her additional testimony that "[c]ustomarily, a Gideon representative would come in to the classroom during the homeroom period, before classes began and during non-instructional time" amplifies the misunderstanding of the DeKalb Defendants as to the meaning and importance of "instructional time" for Establishment Clause purposes. (*See* Affidavit of Brenda Powell, executed October 30, 1996.)

The court finds that the question of what is "instructional time" for Establishment Clause purposes is a legal question for the court, and it resolves this question with reference to the facts and holding of *Schempp*, 374 U.S. 203 (1963), which it believes dictates that time not being used for actual pedagogical instruction is nonetheless not free time for students and is instead compulsory time in a setting in which attendance in

"homeroom period" is required.[40]

The court notes that Ms. Powell teaches at Fyffe School and that her own testimony established that Gideons "customarily" came into her classroom "during the homeroom period." The court having concluded that this is "instructional time" for the purpose of evaluating what is proscribed by the Establishment Clause, does not linger long over the conclusory testimony of Fyffe School principal James Danny Ashley about what is instructional versus noninstructional time. Michael Chandler testified in his February l, 1996 Affidavit, "From what I have observed over the years, the Gideons distribute Bibles to the fifth-grade students and to the twelfth-grade students." Michael Chandler testified that Gideon representatives entered and addressed Jesse Chandler's class, and Ms. Powell's affidavit confirmed that the Gideons were allowed to make a presentation. Mr. Chandler and Mr. Ashley agree that Mr. Ashley escorted the Gideon representatives to the class.

Principal Ashley, like Mr. Chandler, testified in his affidavit executed October 30, 1996 that Gideon representatives distribute Bibles in the classrooms of the

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[40]In *Schempp*, Bible readings opened the school day; the practice was struck as unconstitutional. *See also Berger*, 982 F.2d 1160, 1171 n.6 (7th Cir. 1993), *cert. denied*, 508 U.S. 911 (1993).

fifth and twelfth grades. Mr. Chandler testified in his February l, 1996 affidavit that he refused to permit Gideon Bible distributions at Valley Head in November 1994 but that they occurred elsewhere. Mr. Ashley testified that the Gideons "have always" passed out Bibles during homeroom but contrarily testified to an occasion "recently" when "the Gideon representatives were late in getting the Bibles to the l2th grade classes and I took them to a 5th grade class." Elsewhere in his affidavit, Mr. Ashley again reiterated that Gideon Bibles have been distributed in the classroom. The affidavit of Bill Ayers executed October 30, 1996 establishes that for the 16 years he has been a fifth-grade teacher at Plainview School, the Gideons have been distributing Bibles "the entire time I have been there." The DeKalb County Defendants' response to Plaintiffs' Request f or Admission Number 15 admits that the Gideons passed out Bibles in Ms. Whiteside's classroom during the homeroom period at Plainview School.

Mr. Ayers testified that "[t]hrough the years, the method of distributing the Bibles may have changed" and like Ms. Powell and Mr. Ashley, offered his legal conclusion as to what is instructional time. He testified that such distributions have been made during homeroom period and that students "have considered [a Gideon Bible], like many other things they obtain through school,

a souvenir, and all students generally wanted the Bibles." He also testified that "for the last school year" at Plainview, the Bibles were left in the lunchroom or the principal's office for students to retrieve them as they wished but that classroom distributions "for the last school year" did not occur.

Mr. Ashley testified in his affidavit that the "policy at Fyffe School is to allow community persons and organizations to distribute information in the school." He testified that he permitted announcements and distributions of materials. He testified that "this past year, the Bibles were distributed by Gideon representatives standing on the public sidewalk and not on school property." The various affidavits of Mr. Ayers, Mr. Ashley, and Ms. Powell indicate that policies vary widely from school to school, and that the school officials at Plainview after the lawsuit was filed differ from the policies implemented at Fyffe.

The affidavit of Superintendent Parrish again offered a legal conclusion about instructional time that the court has rejected. However, the affidavit makes plain to the court that there is a reason for the divergent treatment of the Gideon distributions: "There is no formal, written policy concerning this, but the general policy is that with the individual school principal's permission, said information is permitted at various times at the schools."

Therein lies the crux of the problem, as the court informed DeKalb County counsel at the pretrial conference in April. Still no policy of uniform applicability was adopted. Jesse Chandler therefore remains subject to the Gideons entering the classroom when he is in twelfth grade, because there is no policy proscribing it.

The court recognizes that sidewalks and streets in front of public schools have been held to be public fora.[41] The classroom is not traditionally a public forum.[42] The court notes that in *Berger*, the defendants relied upon *Widmar v. Vincent*, 454 U.S. 263 (1983) and *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), for the proposition that where a school opens its doors to one group, it cannot discriminate against any group. However, the *Berger* court correctly focused on the fact that those cases are distinguishable on the basis of the Equal Access Act.[43] The *Berger* court noted that in those cases the religious organization claiming discrimination sought access to empty school

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[41] *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972).

[42] *See Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392.

[43] The Equal Access Act applies only to secondary schools. 20 U.S.C. § 4071(a).

classrooms only, after the school day was over. In *Berger*, the Gideons' access was to the students, an audience. As the *Berger* court observed, "A designated public forum is a place. Children, of course, are not."[44] "The Seventh Circuit found that students are essentially a captive audience under the control of their teachers.[45]

The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions. The court agrees with the *Berger* court that children are not a place and hence finds the classroom distributions here violative of the Establishment Clause. As the *Berger* court stated, "a public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[46] The court finds that the same is true of classroom distributions here.

The court does not wish by the terms of its injunction to discriminate against the Gideons International. The court does not intend by its injunction to single out the Gideons for discriminatory treatment or to

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[44]*Berger*, 982 F.2d at 1167.

[45]*Id.* at 1168.

[46] *Id.*

infringe upon their free-speech rights. By the same token, the court is disturbed by the absence of uniform regulation by school officials and the "gap" this leaves in the delicate area of the interplay between the rights of nonschool persons and students. It is for this reason that the court's injunction makes reference to the location of students. The court takes it as a simple truism that, where the public schools are concerned, adult nonschool persons cannot harass or act aggressively toward students in regard to distributing *any* materials, religious or otherwise. Such conduct would not be reasonable in time, place and *manner*.

The court assumes that distributions by any and all nonschool persons can and shall be governed by a uniform policy of general applicability in all DeKalb County public schools. By ordering this in its injunction, the court does not mean to encumber ordinary discretion on the part of school principals. However, given the divergent practices to which school officials have testified, the court finds that a single, uniform policy adopted by the DeKalb County Board of Education must establish parameters for school principals so that the Establishment Clause is not violated.

The court will, upon adoption of such a policy by the DeKalb County Board and its approval by the court, modify its injunction to reflect the terms of the policy and

to evidence the fact that the court has approved the policy. As reflected in its injunction, the court is disposed to view this policy-making task as the responsibility of the DeKalb County School Board and does not plan to sit as a scrivener over that process or to foist a policy of its own making upon the school board. A reasonable, constitutional policy will be approved and at that time the injunction can be modified to embody only the reasonable time restrictions of the policy.[47]

Michael Chandler testified in his affidavit that prayer in Ms. Carroll's classroom and Ms. Carroll's selection of students to lead prayers occurred over the course of several years, including in 1995. Mr. Chandler testified that Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades and that her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-95

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[47]The court ordered "immediate" distribution of its injunction to the Gideons for two reasons: it is early in the school year yet, and the board has been ordered to promulgate a policy in a short period of time. The court contemplated that the DeKalb County School Board might feel the need to confer with Gideon representatives about policies in place in other school systems that might satisfy constitutional criteria.

school years.[48] He testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

The Defendants put forward no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers. Defendants also admit that Ms. Carroll read aloud from the Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, "Defendants admit that Ms. Carroll asked for volunteers to lead prayers." Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, student-initiated voluntary prayer, non-proselytizing, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that

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[48]At the time the Complaint was filed, Jesse Chandler was a seventh grader at Fyffe School. Complaint, ¶ 2.

such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and may regardless of whether prayers are nonsectarian or students may be excused from the classroom.[49] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment Clause.[50]The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary qualities and that "such study of the Bible, when and historic presented objectively as part of a secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

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[49]*Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. Of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd..*, 884 F. Supp. 1097 (E.D. Va. 1993).

[50]*Lee*, 505 U.S. at 592-95.

The Plaintiffs allege that prayers and devotionals have taken place at school-sponsored assemblies and events and over the school intercom. The court has already addressed scriptural readings and use of religious texts where part of a course of study in its March 1997 opinion and order. The DeKalb Defendants specifically admit that student-led devotionals have taken place at Plainview School. (Stipulation 50.) They contend that these devotionals are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 11.) The DeKalb Defendants more specifically contend that such a "devotion"[51] offered at D.A.R.E. ceremonies and events are "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions." (DeKalb Defendants' Answers to Plaintiff's First Set of Interrogatories, Number 5. *See also* Stipulation 30.) This is the language of Alabama Code § 16-1-20.3 which this court has previously found to be unconstitutional.

The Plaintiffs further allege that Jesse Chandler attended a D.A.R.E. "graduation" ceremony at Fyffe

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[51]DeKalb Defendants' [Supplemental] Responses to Plaintiffs' First Discovery Requests, Number 5.

School on May 18, 1994 at which a student gave a Bible reading and a devotional. The Plaintiffs also allege that in December 1995, the D.A.R.E. ceremony also included prayers and a devotional message as well as teacher-led religious singing. (The Plaintiffs evidently refer to two separate D.A.R.E. events, and the Defendants only to one in the Complaint and Amended Answer.) The court notes that paragraph 26 of the Complaint alleges that the Reverend Graham of Nazareth Baptist Church was invited to speak at the Valley Head D.A.R.E. program in 1994. The Plaintiffs allege that the Reverend Graham quoted from the Bible during his speech. The Defendants admit that the Reverend Graham made references to scripture. (Amended Complaint, ¶ 26.)

All fifth-graders in DeKalb County schools do participate in the D.A.R.E. program. (*See* Stipulation 28.) In Stipulation 30, DeKalb County states, "DeKalb defendants admit that two students volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." The Defendants' response to Plaintiffs' Stipulation 30 that the D.A.R.E. 1995 graduation ceremony included student-led prayers and devotionals as well as the singing of a religious song by a teacher was not specifically denied as to prayers and devotions, and it was admitted that a teacher sang a song.

DeKalb also authenticated a program for its May 18, 1994 Culmination Program at Fyffe School which indicates that D.A.R.E. is at least in part sponsored by the DeKalb County Schools. The record indicates that the discovery response authenticating the document was served on Plaintiffs' counsel October 10, 1996. DeKalb also stipulated in September 1996, that the D.A.R.E. program is "operated and managed by the DeKalb County Board of Education and daily administered and managed by Donna Taheri, an employee of the DeKalb County Board of Education. (Stipulation Number 27.)

On October 30, 1996, with Plaintiffs' dispositive motions pending, the DeKalb Defendants tendered the affidavit of Donna Taheri again invoking the phrase "words of inspiration" and apparently disavowing any state action inasmuch as she testified that D.A.R.E. is a program of law enforcement, not a school-run program. While she testified to her opinion that student devotionals are merely inspirational, not religious, and to her recollection that "there has never been a religious activity at any description at a D.A.R:E. graduation ceremony," her own testimony elsewhere in her affidavit is that some students at D.A.R.E. graduation ceremonies gave Bible readings.

Similarly, in Interrogatory Number 11, the Plaintiffs ask: "In paragraph 50 of the DeKalb Defendants' Response

to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that student-led devotionals have taken place at Plainview School.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'nonsectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" DeKalb responded, "Yes."

Since all of the Parties, as well as the Court, appear to be of the opinion that a "devotional" is a religious exercise, that falls within the category of "prayer, invocations and/or benedictions," and the Court finds that for the same reasons it has found that under established United States Supreme Court precedent that vocal prayers led by students in the classrooms are unconstitutional, student-led "devotionals" are similarly unconstitutional.[52] This applies to devotionals at Plainview as well as to devotionals at school-sponsored events, such as D.A.R.E. events.

The court's findings about the religious nature of devotionals, and the conclusion that D.A.R.E. is a school-sponsored activity, compel the conclusion that use of state facilities, including the intercom, for these religious

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[52]*See Engel*, 370 U.S. at 423-24; *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599.

messages is a violation of the Establishment Clause. The court is not persuaded that anything in the Defendants' affidavits, moreover, establishes any *de minimis* exception to the establishment clause. *Schempp's* admonition that no breach is trivial controls the court's analysis.

The court finds that based on the Defendants' affidavits, devotionals and prayers occurred at Plainview School. The court specifically finds that DeLayne Etherton's affidavit establishes that on Veterans Day 1995, a prayer occurred at the conclusion of a student message. The court also finds that prayer is not mere ceremonial Deism of the sort contemplated by the "in God We Trust" motto on our currency. Accordingly, the court cannot find that prayer should occur on ceremonial occasions such as Veterans Day or any other of the numerous holidays celebrated in the public schools. Nor does the court find any justification for prayer over the intercom as a gesture of patriotism. Indeed, numerous Supreme Court cases counsel against tying religion to patriotism and obviously, against identification with the state. The court concludes that there is neither a *de minimis* nor a "national crisis" exception to the establishment clause. *See generally, Lynch v. Donnelly*, 465 U.S. 668 (1984).

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

Plaintiffs' November 6, 1997 Motion to Enjoin Proceedings in the Etowah County Circuit Court, be and the same is hereby DENIED AS MOOT.

Plaintiffs' November 10, 1997 Motion To Alter Or Amend The Court's October 29, 1997 Permanent Injunction be and the same is hereby GRANTED. The "Findings Of Fact And Conclusions Of Law," upon which the court based its October 29, 1997 Permanent Injunction, are articulated herein.

In addition and in the alternative to GRANTING Plaintiffs' November 10, 1997 Motion To Alter Or Amend: Pursuant to Federal Rule of Civil Procedure 60(a), this Supplemental Opinion and Order, and the "Findings Of Fact And Conclusions Of Law" articulated herein shall be and the same are hereby considered issued concomitantly with the court's October 29, 1997 Permanent Injunction *nunc pro tunc*.

The court's Memorandum Opinion and Order, issued concomitantly, on this date, with this Supplemental Opinion and Order, shall be and the same is hereby INCORPORATED BY REFERENCE into this

Supplemental Opinion and Order.[53]

The court's October 29, 1997 Permanent Injunction shall remain in full force and effect pending an Order from the Eleventh Circuit Court of Appeals or the issuance of a subsequent Order from this court upon due consideration of the Defendant Attorney General's "Motion For Partial Stay Of Permanent Injunction" filed November 10, 1997.[54]

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[53]In its Memorandum Opinion and Order, the court grants Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. The court finds the granting of this motion, and the findings of fact and conclusions of law articulated therein, to be an integral, although not dispositive, portion and basis of its Findings Of Fact And Conclusions Of Law articulated in this Supplemental Opinion and Order, supporting its October 29, 1997 Permanent Injunction. Many of the findings of fact in each document are repetitive, however the court's Memorandum Opinion and Order more clearly articulates those facts that are uncontroverted or which are clearly established for purposes of resolution of dispositive motions.
The two documents issued on this date are meant to be read concurrently, although each is fully supportable on its own. When the two documents issued on this date are read concurrently with the court's March 1997 Memorandum Opinion and Order and the October 29, 1997 Permanent Injunction, one can easily discern the full factual and legal basis for the court's injunction.

[54]The court notes that its October 29, 1997 Permanent Injunction merely **PROHIBITS THE STATE FROM COERCING RELIGIOUS PRACTICES OR PROMOTING ONE TYPE OF RELIGIOUS ACTIVITY OR VIEWPOINT OVER ANOTHER.** Indeed, the court's Permanent Injunction and March 1997 Opinion and Order goes to great lengths to articulate the activities permitted in public schools under the First Amendment to the United States

Constitution as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals. Indeed, the DeKalb County school board, amongst others, noted the clear and distinct guidelines regarding permissible religious activity in public schools that the court's Orders provided educators and the public. As the court's previous Order's disclose, the First Amendment clearly protects personal religious activity and beliefs. At the same time, it clearly prohibits state initiation or promotion of religious activity or beliefs. School officials are arms of the state, and must abide by the requirements of the First Amendment.

The First Amendment requires that states "pursue a course of neutrality toward religion" *Jager v. Douglas County School District*, 862 F.2d 824, 828 (11 Cir. 1989)(citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)). State initiated or sponsored actions that utilize one type of religious activity over another necessarily "promote" that type of activity over others. As the court's March 1997 Opinion and Order notes: "It was devout religious conviction which led many colonists to leave England and settle in America. Unwilling to suffer the state-sponsored Church of England, many settlers came to this country in search of the right to freely exercise their religious beliefs -- to be free from state-established religion." (March Op. and Order at 3 (citing *Engel v. Vitale*, 370 U.S. 421, 434 (1962).)

The right to be free from state-established religion lies at the heart of the concept freedom embodied in the First Amendment to the United States Constitution. *Lee v. Weisman*, 505 U.S. 577, 591 (1992). When the state forces school-children to pray, or coerces participation in religious activity, it infringes on school-children's freedom of religion in violation of their rights under the First Amendment. *See Jaffree*, 472 U.S. at 49 (noting that the Fourteenth Amendment "imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power"). For example, the state may not force Christian, Jewish, Buddhist, Baptist, atheist or agnostic schoolchildren to participate in Muslim religious activities just as the

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state may not force Muslim, Jewish, Buddhist, Baptist, atheist, or agnostic schoolchildren to participate in Christian religious activities (the court utilizes these viewpoints for exemplary purposes only -- under the First Amendment, each individual is entitled to their own beliefs free from state intrusion).

Regardless of whether state officials state officials and school boards believe that a particular religious viewpoint is the "correct" viewpoint, the concept of "freedom of religion," embodied in the First Amendment, means that each person is entitled to choose their own religious beliefs and practices WITHOUT INTERFERENCE OR INFLUENCE FROM THE STATE. *See Jaffree*, 472 U.S. at 52 ("the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority"). Freedom of religion necessarily includes freedom *from* religion. *Id.* at 53. ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). Contrary to the misstatements, hyperbole, and speculation surrounding the court's injunction and March 1997 Opinion and Order, **the court's Permanent Injunction DOES NOT restrict schoolchildren's First Amendment rights** – *it actually protects those rights from unwarranted and unconstitutional interference from the state.*

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MICHAEL CHANDLER, et al.,

Plaintiffs,

v. **CV 96-D-169-N**

FOB JAMES, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER[1]

The court finds it necessary to vacate the portions of its October 31, 1997 Order denying as moot Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment. All other aspects of the court's October 31, 1997

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[1] The court retains jurisdiction over this action during the pendency of Plaintiffs' Rule 59 Motion. *See Fed. R. App. P.* 4(a)(4); *Grigqs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59 (1982); *see also* Court's Supplemental Opinion and Order, notes 3-7 and accompanying text, issued concomitantly with this Memorandum Opinion and Order.

Order shall remain in full force and effect. For the following reasons, the court finds that Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment is due to be granted. The court previously granted leave for Plaintiffs to file their Motion For Partial Summary Judgment out of time.

The Plaintiffs have brought several closely related claims in this lawsuit. First, in Count One, they challenged Alabama Code section 16-1-20.3 as violative of the First Amendment on its face. The Plaintiffs sued Alabama's Attorney General, in his official capacity, as he is charged with the enforcement of Alabama statutes. The Plaintiffs also sued the State Board of Education and all of its members, including the State Superintendent of Education and the Governor, and the President of the State Board of Education, all in their official capacities. These parties, charged with implementing Alabama's laws regarding education, promulgated an administrative regulation, based on Alabama Code Section 16-1-20.3. The DeKalb County Board of Education carried out the statute and the regulation in the DeKalb County schools, where Michael Chandler works and where Jesse Chandler attends. This court has already addressed the facial statutory claim in its March 12, 1997 Opinion and Order ("March 1997 Opinion and Order"). There, the court found that § 16-1-20.3

violated both the Free Exercise Clause and the Establishment Clause of the First Amendment. The facial claim has been resolved as against these Defendants by the court's March 1997 Opinion and Order.

Based, in part, upon the court's findings in its March 1997 Opinion and Order, the court now finds that Plaintiffs are entitled to judgment as a matter of law on all of their claims discussed below. The court has made extensive factual findings in its Supplemental Opinion and Order issued concomitantly with this order, discussing injunctive relief, and it has delineated there general facts related to injunctive relief as well as summary judgment facts. The court does not recapitulate in toto those factual findings here, but rather, summarizes the facts at summary judgment and focuses on the law, including the burden the DeKalb County Board of Education bears at summary judgment.[2]

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[2] While the DeKalb County Board filed affidavits, it did not make reference to them in its brief nor suggest in its brief that there were "genuine issues of material fact" which remain to be resolved. Instead, the DeKalb County Board argued that if the court were to rule on the facial challenge to the statute, most of the issues in this case would be resolved. The Governor, over the Plaintiffs' protests, did oppose the motion for partial summary judgment against DeKalb County, filing a brief which dealt extensively with the filed affidavits.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56*(c). As the Supreme Court has explained the summary judgment standard:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)(citations omitted). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *see also Barfield v. Brierton*, 883 F.2d 923, 933 (llth Cir. 1989).

The party seeking summary judgment has the initial burden of informing the court of the basis for the motion and of establishing, based on relevant "portions of 'the pleadings, depositions, answers to interrogatories, and admissions in the file, together with affidavits, if any,'" that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also* Fed. R. Civ. P. 56(e).

In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." *Fed. R. Civ. P.* 56(c); *Matsushita*, 475 U.S. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587; *see also Anderson*, 477.

In other words, the moving party must show a legal basis for the court to enter judgment, but it does not have to shoulder the burden of production. Once the moving party has made such a showing, it falls to the nonmoving party to produce evidence sufficient to establish the truth of each element on which it will bear the burden of proof at trial.

In *Celotex*, for example, the defendant, relying solely on the plaintiff's discovery responses, moved for summary judgment. Without producing any evidence that tended to negate the plaintiff's claims, the defendant argued that the plaintiff could not prove her claims at trial. In upholding the trial court's grant of judgment in favor of the defendant, the *Celotex* Court held that at summary judgment, the nonmoving party must support his or her

claims. The moving party does not have to disprove them. It held that nothing in Rule 56 requires a moving party to support its motion with affidavits or with anything else that would disprove the nonmoving party's (usually the plaintiff's) claims. *See Celotex*, 477 U.S. at 323. The moving party does not even have to prove the nonexistence of a genuine issue of material fact, but rather the nonmoving party must demonstrate that genuine issues for the fact finder do exist. *Id.*; 325. U.S. at 249.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION[3]

It is with these principles in mind that the court views the Governor's submission on behalf of DeKalb County and the affidavits filed by DeKalb County itself. Even when taking Defendants' responses into consideration, and under the standards enunciated herein, the court still finds that Plaintiffs are entitled to summary judgment. While the affidavits deny the existence of any "religious" activities, the witnesses simultaneously acknowledge that Bible readings, prayers and "devotionals" have taken place at various DeKalb County school-sponsored settings. Under *Celotex*, this is not a showing sufficient to demonstrate the

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[3]Because of the factual nature of this inquiry, the court combines its analysis.

existence of a genuine issue of fact. Whether a "devotional" took place may be a fact for resolution by the fact finder, but whether an admitted "devotional" given over the intercom during the school day violates the First Amendment is a matter of law for the Court to decide.

The court is mindful that it must draw inferences in favor of the nonmoving party. Nevertheless, when the nonmoving party, here DeKalb, as represented by the Governor, offers testimony in an affidavit that is internally contradictory, the court does not believe that it is under an obligation to ignore facts admitted by the witness (*i.e.*, that Bible readings or prayers occurred) in favor of that witness' characterization of the same event (the Bible readings and devotionals that ended with a prayer were "not religious"). Similarly, the court does not believe that it is under an obligation to assume for purposes of summary judgment that an event did not occur, when, in response to the allegations of the Plaintiff, the Defendants' witness states that he or she does not remember whether the event took place or not. The court does not believe that this is a showing sufficient to "negate [the plaintiff's] claims" and demonstrate the existence of a material issue of fact.

I. Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs moved for summary judgment as to several religious practices ongoing in DeKalb County.

Some of these overlap with the issues on which Plaintiffs also sought judgment on the pleadings. The court notes at the outset that stipulations among parties are admissible for Rule 56 purposes and require no extrinsic evidence. *Hadady Corp. v. Dean Witter Reynolds*, 739 F. Supp. 1392, 1395 n. 2 (D. Cal. 1990).[4] The same is true of undisputed documents. *See* 10A Wright, Miller & Kane, *Federal Practice & Procedure*, Sec. 2730.1 & nn. 10-11, at 84-85. The court may also consider affidavits earlier submitted in a motion for preliminary injunction. *Clinkscales v. Chevron USA Inc.*, 831 F.2d 1565 (11th Cir. 1987). Any exhibits in the court file at summary judgment may be admitted, regardless of the reason for their initial submission. *McLaughlin v. Liu*, 849 F.2d 1205, 1206 n.3 (9th Cir. 1988).

A. Prayer at Football Games

In his affidavit, filed along with the Complaint, Michael Chandler offered testimony regarding prayers at the DeKalb County high school football games in paragraphs 8-16. Therein, he specifically testified that he

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[4]The Eleventh Circuit has held, in a ruling based on stipulated facts, that if evidence is capable of different reasonable interpretations, findings based on one of these reasonable interpretations are not clearly erroneous. *GLBA v Pryor*, 110 F.3d 1543, 1546-47 (11th Cir. 1997). (*quoting L & C Marine Transport Ltd. v. Ward*, 755 F.2d 1457, 1461 (11th Cir. 1985)).

has personally witnessed such prayers; that he has been offended on his behalf and on behalf of his son Jesse; and that he videotaped some of these prayers, including one at Valley Head High School, where he must attend all home games,[5] that occurred September 1, 1994. His Declaration under Penalty of Perjury of November 10, 1996 similarly contains testimony that students have been leading prayers at high school football games.[6] None of the Defendants has offered testimony that contradicts any of evidence or that constitutes a genuine question of material fact.[7]

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[5]*See* Amended Answer of DeKalb County Board of Education, ¶ 19. See also Plaintiffs' Designation of Exhibits filed November 21, 1996 and Affidavit Of Michael Chandler February 1, 1996.

[6]Exhibit B to the Plaintiffs' Motion to Enforce Voluntary Cessation Agreement is the videotape which according to the Chandler February 1, 1966 affidavit includes the September 1, 1994 Valley Head prayer. It also includes filmed prayer after this lawsuit was filed at Geraldine High School, but for purposes of summary judgment, the court does not consider the Geraldine prayer.

[7]It is not the court's province to judge Mr. Parrish's veracity at this stage. Assuming that he is telling the truth and that pregame student or clergy-led prayers had ceased during the 1996 school year, this is not a defense to the Plaintiffs' motion for summary judgment.

If a defendant could assure itself victory in a lawsuit simply by promising to "be good" in the future, the courts would be overrun with parties repenting of their past wrongdoing -- temporarily. It is axiomatic that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case. . . ." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see*

The practices which DeKalb has admitted in its Stipulations, ¶¶ 51, 53 and 55, are unconstitutional, regardless of any purported explanation for them. *See Abington Twp. v. Schempp*, 374 U.S. 203, 223-24 (1963); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 830 (1989), *cert. denied*, 490 U.S. 1090 (1989); *Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646 (llth cir. 1984). The court has so found in its March 1997 Opinion and Order.

B. Bible Readings and Devotionals at Assemblies

The DeKalb Defendants have admitted that students gave "words of inspiration" and a teacher sang a religious song at a D.A.R.E. graduation attended by all fifth grade students. (Defendants' Response ¶¶ 28-32).[8] They do not deny, as the Plaintiffs allege in Stipulation number 30, that these words included a reading from the Old Testament. (Stipulation 30.) Rather, they "admit that two students

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also United States v. Oregon State Med. Soc'y, 343 U.S. 326, 333 (1952).

Mr. Parrish does not deny that pre-football game prayers have occurred in the past, but rather he claims that this activity has stopped after the lawsuit was filed. (Parrish Aff., ¶ 6.) Even assuming that this were true, voluntary cessation of allegedly unconstitutional conduct is not a defense.

[8]While the D.A.R.E. program is not compulsory, all fifth graders in DeKalb County participate. *See* Stipulation 28.

volunteered to give words of inspiration at the D.A.R.E. graduation program at Fyffe School on May 18, 1994." (Stipulation 30.) In supplemented discovery apparently served February 4, 1995, the DeKalb Defendants equate "words of inspiration" with a "devotion."[9] In addition, the DeKalb Defendants admit that student-led devotionals have occurred during school-sponsored events and over the public address system. (Defendants' Response ¶¶ 30, 50). Michael Chandler's February 1, 1996 affidavit similarly offers testimony of student-led devotionals. While Donna Taheri testified to her opinion that student devotionals are merely inspirational rather than religious, and to her recollection that "there has never been a religious activity of any description at a D.A.R.E. ceremony," testimony elsewhere in her affidavit indicates that some students at D.A.R.E. graduation ceremonies gave Bible readings.

In response to Plaintiffs' Interrogatory Number 5, "Do the DeKalb defendants contend in this lawsuit that this May 18, 1994 action by these two students was 'non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions?," the DeKalb

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[9]The supplemental discovery, response to interrogatory number 5, is appended as Exhibit C to Plaintiffs' April 1, 1997 Supplement to Motion for Sanctions and Opposition to DeKalb Defendants' Request for Time.

defendants responded, "Yes" in addition to equating "words of inspiration" with "devotion[s]." The court finds it reasonable to conclude that mere "words of inspiration" would not require the invocation of the Alabama school-prayer statute and that DeKalb conflated such a category of inspirational words into the category of devotions, in hopes of thereby insulating them from scrutiny. The specific invocation of the statute would not be necessary for secular "words of inspiration," and DeKalb has expressly invoked the language of the statute in discovery responses.

The same is true of conceded devotionals at Plainview School, referenced in Stipulation 50 and similarly answered "Yes" in response to the same contention interrogatory referencing that specific conduct. (In Stipulation 50, the DeKalb Defendants actually term the exercise "devotionals" and then additionally invoke the language of the statute.)

The court finds that a devotional is generally understood to be religious and that the affidavit of Bill Ayers refers to devotionals that took place at Plainview. He also testified to student messages over the intercom during the Gulf War that were of "a devotional character, . . . but not religious," in ¶ 5 of his affidavit, while simultaneously testifying in ¶ 3 that he had no recollection of devotionals being broadcast. He testified that student

messages "of a devotional character" contained "no religious references" although "there may have been an occasional brief religious reference or prayer." (Ayers Aff., ¶ 5.) The students giving the messages "did not pray and read the bible" "each" of the "three or four, maybe five times" they led the devotionals, according to Mr. Ayers.

He also testified to a devotional over the public-address system on Veterans Day 1995. DeLayne Etherton testified that this "devotion, meditation, or other inspirational message" ended with a prayer. (Etherton Aff., ¶ 8.) Like Mr. Ayers, DeLayne Etherton cannot recall "if a Bible reading or prayer was given" on other occasions "although there may have been, but not each time."

DeLayne Etherton cannot specifically recall the content of these "so-called 'devotionals'" that were "not necessarily" prayer and Bible reading. DeLayne Etherton does recall, however, that the Veterans Day message ended with a prayer but "was not of a religious nature." (Compare Etherton Aff. ¶ 8 with ¶ 6.)

At this juncture, *Celotex* comes into play. Testimony about "nonreligious" devotionals that ended with a prayer and that were conducted with the protection of a statute that permits "student-initiated prayer, invocations and benedictions" at school events does not establish a genuine issue of material fact.

Similarly, a witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden. The nonmoving party must come up with evidence that negates the version of events alleged by the moving party -- an acknowledgment that the event may have occurred, but the witness cannot remember, falls short.

The court cannot reconcile these observations with the truism that prayer is a quintessentially religious act. The court further notes that, despite protestations that messages were merely inspirational or patriotic from all of DeKalb County's affiants, once again, it answered the Plaintiffs' contention interrogatory referencing student-initiated prayer in the language of the statute, "Yes."

The admissions of ¶¶ 30 and 32 of the DeKalb Defendants' response are admissions of constitutional violations. See *Engel*, 370 U.S. at 226; *Schempp*, 374 U.S. at 203. These activities are unconstitutional, even if the religious devotionals were led or given by students. *Schempp*, 374 U.S. at 207 (prayer and Bible reading); *Treen*, 653 F.2d at 902 (prayer); *Ingebretsen*, 88 F.3d at 279; *Hall*, 656 F.2d 999 (student-led devotionals); *Meltzer v. Board of Pub. Instr.*, 548 F.2d 559, 573-73 (5th Cir.), aff'd rehearing en banc, 577 F.2d 311, 312 (5th Cir. 1978),

cert. denied, 439 U.S. 1089 (1979) (student-led devotionals); *Herdahl v. Pontotoc Count Sch. Dist.*, 887 F. Supp. 902, 908-09 (N.D. Miss. 1995) (student-led devotionals over public-address system are not within the ambit of Equal Access Act, 20 U.S.C. 4071 et seq; Bible readings followed by short prayer speak to a captive audience through state machinery).

None of the affiants aid DeKalb County in establishing a genuine question of material fact as to prayer and devotionals -- it is admitted in the affidavits, and in stipulations that predated them -- that prayer occurred. The court concludes that there is no *de minimis* exception for Establishment Clause 374 U.S. 203, 225 (1963); *Jager*, 862 F.2d at 832 (irrelevant that pregame prayers are brief and football season is short). Nor is the court persuaded that an exception, exists for perceived crises and wartime. Indeed, the court would suspect that we might be most vigilant about the Establishment Clause at precisely such times. *See generally Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985).

C. Prayer in Classrooms

It is uncontroverted in the pleadings and in the record that there has been prayer in classrooms, as Plaintiffs allege. The court notes that the DeKalb County Defendants have responded to Plaintiffs' interrogatories

regarding faculty solicitation of student volunteers to lead classroom prayer with the response that such activity was undertaken as "non-sectarian, non-proselytizing, student-initiated voluntary prayer, invocations and/or benedictions." (*See* Plaintiffs' First Discovery Request to DeKalb Defendants; DeKalb Defendants' Answers to Plaintiffs First Set of Interrogatories, "Yes").

Further, Michael Chandler testified in his affidavit that Ms. Carroll allowed prayer in her classroom and selected students to lead prayers over the course of several years, including in 1995. Ms. Carroll was one of Jesse Chandler's teachers in both fifth and sixth grades, and her classroom practices regarding prayer and religious activity were substantially similar in the 1993-94 and 1994-1995 school years. Mr. Chandler testified that in 1995, Ms. Carroll read from her Bible to the class and selected devotionals for students to read.

As noted, the Defendants do not challenge this evidence. Indeed, they offer no testimony from Ms. Carroll. In paragraph 16 of their Amended Answer, the DeKalb County Defendants admit that Ms. Carroll allowed student volunteers to pray in front of the class. In stipulation 46, the DeKalb County Defendants "admit that Ms. Carroll asked for volunteers to lead prayers." Defendants also admit that Ms. Carroll read aloud from the

Bible, and "may have selected devotionals for students to read." The Plaintiffs asked the DeKalb Defendants in discovery, "In paragraph 46 of the DeKalb Defendants' Response to Plaintiffs' Statement of Stipulated Facts, the defendants state, 'Defendants admit that Ms. Carroll asked for volunteers to lead prayers.' Do the DeKalb defendants contend in this lawsuit that such prayers offered by student 'volunteers' are 'non-sectarian, non- proselytizing, student-initiated voluntary prayer, invocations, and/or benedictions'?" The Defendants responded, "Yes."

The court concludes, as it concluded in its March 1997 Opinion and Order, with reference to the statute, that such practices are unconstitutional regardless of whether the practices are ostensibly "voluntary" or "student-initiated" and regardless of whether prayers are nonsectarian or students may be excused from the classroom.[10] The court finds that such classroom practices need not involve direct coercion in the form of a legal penalty or sanction in order to offend the Establishment

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[10]*Engel v. Vitale*, 370 U.S. 421, 423-24 (1962); *Schempp*, 374 U.S. at 224-25; *Lee*, 505 U.S. at 599; *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279 (5th Cir. 1996), cert. denied, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1479-80 (3d Cir. 1996); *Herdahl v. Pontotoc County Sch. Dist.*, 887 F. Supp. 902, 908 (N.D. Miss. 1995); *Gearon v. Loudon County Sch. Bd.*, 884 F. Supp. 1097 (E.D. Va. 1993).

Clause.[11] The court further finds that it should be clear that activities such as those admitted by DeKalb County have been squarely governed by *Engel* and *Schempp* for some 35 years.

That said, the court further concludes that the teaching of *Schempp* is also that the Bible may be studied for its literary and historic qualities and that "such study of the Bible, when presented objectively as part of a "secular program of education" is constitutional. This is distinct from reading devotionals from the Bible absent academic content.

D. Distribution of Bibles and Religious Literature by Nonstudents

The DeKalb Defendants admit in their responses to stipulations that they permit representatives of Gideons International to distribute New Testaments to public school students in the classroom. (Stipulation ¶ 35.) Gideons representatives have been allowed to enter classrooms and make presentations to the students. (Powell Aff., ¶ 5.) Jesse Chandler was in a classroom where such presentations and distributions took place and felt compelled to accept a Bible. (Chandler Aff., ¶ 21.) The court does not seek to resolve any factual issue as to the

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[11] *Lee*, 505 U.S. at 592-95.

content of any presentation the Gideons might make, because it is not material in view of the fact that the Gideons are impermissibly in the classroom during instructional time.

Courts have uniformly held that school officials are prohibited from permitting outside groups and individuals to distribute Bibles and other religious literature to students on public school property. See *Berger v. Rensselaer Central Schl. Corp.*, 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993); *Gregorie v. Centennial Schl. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Lubbock C.L.U. v. Lubbock Indep. Schl. Dist.*, 669 F.2d 1038, 1040, n.38 (5th Cir. 1982).[12] The reason for this proscription is that students are a captive audience in such situations and face school and peer pressure to accept the Bibles. In addition, such Bible distributions interfere with the rights of parents to raise their children according to family religious traditions. See *Schempp*, 374 U.S. at 226.

Bible distribution creates the impression of school endorsement of the religious activity and, as at least one

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[12] Public school classrooms and buildings are not public fora such that outside groups have any cognizable free-speech interest in distributions. *Berger*; 982 F.2d at 1166. Here, of course, the issue is distribution inside public-school classrooms during instructional time.

court has noted, facilitates the accomplishment of the religious mission of groups such as the Gideons. *See Berger*, 982 F.2d at 1171. Such distribution here expressly occurred with the permission of school officials, such as Mr. Ashley and Ms. Powell at Fyffe. Superintendent Parrish testified that there is no formal written policy governing distributions of materials. (Parrish Aff., ¶ 8.) Policy is established by the individual school principals, and varies widely. (See Parrish Aff., ¶ 8; Ashley Aff., ¶ 8.)

Ms. Powell and Mr. Ashley testified that a distribution that occurred after homeroom was aberrational. (Ashley Aff., ¶ 6; Powell Aff., ¶ 5.) This testimony is not material because it does not affect the legal question concerning whether homeroom time is instructional time for establishment clause purposes.[13] Thus, any attempt to explain away the unconstitutional activity as an aberration or exception is unavailing. (See, e.g., Ashley Aff., ¶ 6.) Defendants admit that they allowed Bible distribution to occur in a classroom setting, with participation of school officials; an atmosphere rife with potential for both proscribed endorsement of religion and peer pressure. A practice of in-school distribution

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[13]The court notes that the Equal Access Act applies only to secondary, not primary schools. It is not implicated as regards the Gideon distributions at issue here.

immediately before the first class period is still constitutionally infirm. (See Powell Aff., ¶ 5.) The court is not persuaded by the "homeroom period is noninstructional time" argument made by all the Defendants' affiants on the subject.

Michael Chandler testified that all students are required to attend homeroom periods and that DeKalb County schools are closed campuses and that students are not free to leave. (Chandler Dec. of November 10, 1996.) Nowhere in the record is this testimony controverted. Moreover, the court finds that the question of what is "instructional time" for purposes of the Establishment Clause in such situations is resolved by *Schempp*. *Schempp* explicitly involved Bible readings which opened the school day. They were not given during time otherwise reserved for academic instruction, but rather, during homeroom, and were struck as unconstitutional. The classroom is not traditionally a public forum. *See, e.g., Lamb's Chapel v. Center Moriches Union Sch. Dist.*, 508 U.S. at 392; *see also Berger*, 982 F.2d at 1167.

The distribution of Bibles or other religious material by nonschool persons during the school day, regardless of the exact location where that distribution took place (even outside the actual classroom), and purportedly involving only "willing" students, has been almost uniformly held

unconstitutional. The critical factors for the courts are that students will feel compelled through peer pressure to accept the Bibles and will sense state endorsement. *Berger*, 982 F.2d at 1166-1167 & n.7 (Gideon distribution at school "gives the Bible distribution an official quality."). The court finds that Defendants' practice of allowing Gideons and other outside groups to distribute Bibles and/or other religious materials to students during the homeroom period violates the Establishment Clause.

E. Miscellaneous Matters

The court notes that initially, the DeKalb Defendants did not file a response to the Plaintiffs' motion. However, the Governor responded to the motion filed against the DeKalb Defendants and concerning only events which took place in DeKalb County schools. The DeKalb Defendants then filed a separate opposition to the Plaintiffs' Motion for Partial Summary Judgment, which ignored the affidavits purportedly offered on their behalf, made no reference to evidence, and relied on section 16-1-20.3 as DeKalb's sole justification for its actions. DeKalb County urged the court to rule on the facial validity of the statute before any other matters, representing that this would moot these remaining matters.

Plaintiffs moved to strike DeKalb affidavits on a

number of grounds that were briefed extensively. The court finds that it need not do so, however, because it finds that DeKalb County has failed to meet its burden of adducing any evidence suggesting that a genuine question of material fact exists. Further, the matters raised in the affidavits purport to insinuate defenses to the Plaintiffs' claims. Legal conclusions about homeroom time, speculations about a witness' thoughts and motives, contradictions of earlier materials in the record while still offering admissions, and espousals of the theory that patriotism or national crisis justifies violation of the Establishment Clause do not meet the burden of resisting summary judgment here.

Asking the court to decide the facial issue first is not evidence. Likewise, the court has already rejected the Governor's theory that the Free Exercise Clause negates the Establishment Clause:

> Although the Establishment Clause works with the Free Exercise Clause to fully safeguard our religious freedom, there is an inherent tension between the two clauses. If the Free Exercise Clause were an absolute mandate, it would subsume the Establishment Clause. Paradoxically, making "Free Exercise" an absolute mandate

> would. . . effectively destroy "freedom of religion" as we know it.
>
> . . .
>
> Although the Free Exercise Clause guarantees complete freedom of belief, the guarantee does not extend to protect all religious activity. . . . If the Free Exercise Clause protected all religious activity, it would not be possible to maintain a civil, pluralistic society. . . . Similarly it is easy to see how the absolute protection of religious activity would quickly lead to an establishment of religion.

March 1997 Opinion and Order at 6-7 (internal citations omitted).

In response to the argument that the statute, by allowing "nonproselytizing, nonsectarian student initiated prayers at compulsory and noncompulsory school-related events," did no more that set forth the students' Free Exercise rights, the court has noted:

> Under the dictates of the Establishment Clause and Supreme Court decisions, students do not have an absolute right to engage in such prayer. While the defendant argues that the statute does no more than

> recognize students' free exercise and free speech rights, the Court will not ignore the plain meaning of the statute . . . . section 16-1-20.3 . . . authorizes religious activity in our public schools which is plainly unconstitutional.

March 1997 Opinion and Order at 36 n.31.

The court likewise finds no merit in the argument that state action is lacking. This argument, too, has been rejected by the court in its March 1997 Opinion and Order. In discussing the constitutionality of "voluntary" or "student-initiated" prayer, the Court discussed the relationship between student choice and state action:

> Moreover, in the public school setting, federal courts have repeatedly struck down legislation and practices permitting prayer, even when the prayer at issue was ostensibly "voluntary" or "student-initiated." For example, in *Engel v. Vitale*, the Supreme Court declared unconstitutional a school district's practice of having students recite aloud a non-denominational prayer even though students were free to elect not to participate.
>
> . . .
>
> Similarly, because the resources and

> facilities of the state are utilized when a "student-initiated' prayer is given in public schools, those hearing the prayer may be led to believe the state is associated with or endorses either the speaker's religion, or religion over non-religion.

March 1997 Opinion and Order at 10-11.

As to all of Plaintiffs' claims, the court rejects the apparent *de minimis* argument. The Governor argues that nonpervasive First Amendment violations are unworthy of the court's notice. (*See* Gov. Br. at 17 (prayer before a football game is "a minute part of the program;) Gov. Br. at 14 (any incidental religious comment does not work an establishment of religion"); Gov. Br. at 12 (no constitutional violation occurs where religious activities are not "pervasive"); *see also* Powell Aff., ¶ 5 (Gideon presentation was "short").) The argument is, as already noted, unavailing. *See Engel*, 370 U.S. at 436; *Schempp*, 374 U.S. at 224-25.

Most recently, in *Lee v. Weisman*, the Supreme Court was again confronted with the claim that a brief "nonsectarian" prayer occurring once in a lifetime was a de minimis act. The Court again rejected the de minimis argument:

> It is, we concede, a brief exercise during

> which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the Rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority . . . [T]he intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

Lee, 505 U.S. at 594.

In *Jager v Douglas County School District*, 862 F.2d 824 (llth Cir.), *cert. denied*, 490 U.S. 1090 (1989), Judge Johnson rebuffed the school district's contention that a prayer of 60 to 90 seconds is a "*de minimis* violation." Id. at 832. Judge Johnson wrote:

> This approach is flawed. It is 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment'. . . . The Establishment Clause does not focus on the amount of time an

> activity takes, but rather examines the religious character of the activity. As the Fourth Circuit recognized . . . '[a] prayer, because it is religious does advance religion and the limited nature of the encroachment does not free the state from the limitations of the Establishment Clause.'

Id. (internal citations omitted).

Nothing in the evidence rescues the Defendants from the mandates of *Celotex*. Nothing in the evidence suggests either a valid defense or a genuine question of material fact. The Defendants' affidavits do not do so. Accordingly, the court finds that summary judgment is due to be granted.

ORDER

Based on the foregoing, it is hereby CONSIDERED and ORDERED that:

That portion of the court's October 31, 1997 Order denying as moot. Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby VACATED. All other aspects of the court's October 31, 1997 Order shall remain in full force and effect.

Plaintiffs' September 27, 1996 Motion For Partial Summary Judgment be and the same is hereby GRANTED.

The court's Supplemental Opinion and Order, issued concomitantly, on this date, with this Memorandum Opinion and Order shall be and the same is hereby INCORPORATED BY REFERENCE into this Supplemental Opinion and Order.[14]

DONE this the 12th day of November, 1997.

/s/ Ira DeMent

UNITED STATES DISTRICT JUDGE

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[14]See the court's Supplemental Opinion and Order, also issued on this date, at footnote 53 and accompanying text.

Appendix I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 97-6898, 97-6953

Filed
U.S. Court of Appeals
Eleventh Circuit
Apr 13, 2001

D. C. Docket No.
96-CV-169-N

Thomas K. Kahn
CLERK

MICHAEL CHANDLER, individually
and as next friend of his son,
Jesse Chandler, *et al.*,

Plaintiffs-Appellees,

versus

DON SIEGELMAN, in his official capacity
as Governor of the State of Alabama and
President of the State Board of Education,
BILL PRYOR, in his official capacity as
Attorney General of the State of Alabama

et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

ON PETITION FOR RE-HEARING EN BANC
(Opinion October 19,2000)

Before ANDERSON, Chief Judge, TJOFLAT, EDMONDSON, B1RCH, DUB1NA BLACK, CARNES, BARKETT, HULL, MARCUS, and WILSON, Circuit Judges.

ORDER: The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Elevcnth Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

/s/
R. Lanier Anderson
Chief Judge

Appendix J

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALABAMA'S SCHOOL-PRAYER STATUTE

ALABAMA CODE § 16-1-20.3

(a) The legislative intent and purpose for this section is to protect the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article 1, Section 4 of the Constitution of Alabama of 1901, to define for the citizens of Alabama the rights and privileges that are accorded them on public school and other public property and at school-related events, and to provide guidance to public school officials on the rights and requirements of law they must apply. Further, the intent and purpose of the Legislature is to properly accommodate the free exercise of religious rights of its student citizens in the public schools and at public school events as mandated by the First Amendment to the United States Constitution and the judicial interpretations thereof as given by the United States Supreme Court.

(b) On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

(c) Nothing in this section shall otherwise diminish

the right of any student or person to exercise his or her rights of free speech and religion, including prayer, as permitted by the United States Constitution and the Alabama Constitution on public school or other public property, or other property, at times or events other than those stated in subsection (b).

(d) The exercise of these rights on public school or other public property, or on other property for school-related activities, by students or others, shall not be construed to indicate any support, approval, or sanction by the State of Alabama, any political subdivision thereof, municipal corporation, governmental entity of any description, or any agent or employee of any governmental entity of the contents of any such prayer, invocation, benediction, or other activity, or be an unconstitutional use of any public school property or other public property, or be the promotion or establishment of any religion or religious belief.

Ala. Code § 16-1-20.3 (1995).

Supreme Court, U.S.
FILED

MAY 17 2001

OFFICE OF THE CLERK

(4)

No. 00-1606

IN THE

Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of **JESSE CHANDLER**,

Petitioners,

vs.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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32 pp.

QUESTIONS PRESENTED

1. Whether this Court should deny review where petitioners' claims become moot on May 23, 2001, and where petitioners own tactical litigation choices produced the delay that rendered this case moot?

2. Whether this Court should deny review of the court of appeals' nonfinal judgment vacating and remanding an injunction for redrafting, where the district court will then be best situated to tailor any new injunction to reflect, inter alia:

   a. the concrete facts and circumstances of the case; and
   b. the intervening mootness of most or all of plaintiffs' challenges.

3. Whether the court of appeals correctly held that the district court erred by ordering public schools to impose discriminatory censorship against genuinely student-initiated religious speech?

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STATEMENT OF THE CASE

Petitioner Michael Chandler brought suit on his own behalf and on behalf of his son Jesse, a minor. Chandler and his son challenged the constitutionality of both an Alabama statute, Ala. Code § 16-1-20.3, and alleged religious practices in the DeKalb County schools, under the First and Fourteenth Amendments to the United States Constitution. Chandler brought suit under 42 U.S.C. § 1983, naming as defendants in their official capacities the Governor of Alabama, the Attorney General of Alabama, the Alabama State Superintendent of Education, the members of the Alabama State Board of Education, the DeKalb County Superintendent of Education, and the members of the DeKalb County Board of Education. Chandler requested a declaration of the unconstitutionality of the Alabama statute and the challenged religious practices in the schools, an injunction prohibiting the challenged religious practices in the schools, and an award of attorney fees. Complaint ["Cplt."] at 18-19. Chandler did *not* seek damages. *Id. See also* Plaintiffs' Report on Status of Protective Order for Pseudonymous Pleading, Joint Motion to Vacate Trial Setting and Agreement Regarding Voluntary Cessation, and Joint Stipulations of Fact, p. 2 ("As the plaintiffs have stressed to various counsel, this suit is for injunctive relief, not damages").

At the time Chandler filed suit, he was an assistant principal at Valley Head School, a school operated by respondent DeKalb County Board of Education. Cplt. at 3. Michael Chandler has since retired from that position.[1]

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[1]Chandler retired pursuant to a settlement agreement in a separate, employment-related lawsuit. *Chandler v. DeKalb County School Board*, (continued...)

Chandler's son Jesse was a seventh grade student at Fyffe School, a school operated by respondent DeKalb County Board of Education, at the time suit was filed on February 1, 1996. Cplt. at 3. It is undisputed that Jesse Chandler is now a high school senior and is expected to graduate on May 23, 2001. *See* Pet. at 3.

On March 12, 1997, the district court granted partial summary judgment for Chandler, holding unconstitutional the challenged state statute, § 16-1-20.3. *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997).[2] No party pursued an appeal from that decision.

On October 29, 1997, the district court issued a Permanent Injunction. Pet. App. F1-F21. This injunction imposed a complex set of restrictions, exceptions to the restrictions, and exceptions to the exceptions. Pet. App. F4-F14. For example, in paragraph 6(a), the injunction purported to restrict only "school organized or officially sanctioned religious activity in the classrooms," but nevertheless applied "regardless of whether the activity is initiated, led by, or engaged in by students." Pet. App. F4 (emphasis omitted). The same

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[1](...continued)
No. CV 96-PT-1000-M (N.D. Ala.). As part of that settlement, Chandler also agreed not to seek future employment of any nature with the DeKalb County School System.

[2]The petitioners' Appendix to the Petition purports to, but does not, contain this opinion as Appendix E. Instead, pages E3-E75 simply duplicate pages G3-G75. The Court should also note that the footnote numbering in petitioners' Appendix D is pervasively jumbled. (Respondents promptly alerted petitioners to these and other formatting problems.)

provision explicitly permitted students "to quietly engage in religious activity during non-instructional times," but only "so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves." *Id.* F5 (emphasis omitted).

Certain provisions of the injunction allowed DeKalb County school officials to treat student religious expression evenhandedly with other student expression, *e.g.*, *id.* F6, F13 (student religious literature distribution subject to same time, place, and manner restrictions as student distribution of nonreligious materials). Elsewhere, however, the injunction commanded DeKalb to impose discriminatory restrictions only on private religious expression. *Id.* F4-F14. For example, students could recite secular texts or sing secular songs at school-sponsored talent shows but could not use material with a religious content or viewpoint. Pet. App. F9-F10 (para. 6(d)). Student graduation speakers could expound at length on secular subjects or the gratitude due parents but could not give more than a "brief personal expression . . . which contains religious references," Pet. App. F6-F8 (para. 6(b)).

In view of its earlier opinion overturning the challenged state statute and its permanent injunction addressing the challenged religious practices, the district court then vacated a trial setting for the case as unnecessary.

On November 12, 1997, the district court issued findings of fact and conclusions of law in a Supplemental Opinion and Order. Pet. App. G1-G75. The same day, the district court granted partial summary judgment for Chandler and made

accompanying findings of fact and conclusions of law in a Memorandum Opinion and Order. Pet. App. H1-H30.

Respondents appealed from the Permanent Injunction, the Supplemental Opinion and Order, and the Memorandum Opinion and Order.

On appeal, respondents[3] contested only certain aspects of the *remedy* the district court selected. Respondents did not appeal the district court's invalidation of the challenged state statute. Nor did respondents contest on appeal the district court's findings that the DeKalb County defendants had previously engaged in unconstitutional officially organized or sponsored religious activities. Rather, the respondents challenged on appeal only specific portions of the Permanent Injunction. *See* Pet. App. B4-B6.

In particular, respondents focused their appeal upon those portions of the Permanent Injunction that forbade DeKalb County from "permitting" various religious expressive activities by students and other nonschool personnel. Respondents did not contend that students have an affirmative right to engage in religious speech even where secular student speech would not be permitted. Instead, respondents argued that the injunction improperly required DeKalb to impose unconstitutionally *discriminatory* restrictions on private religious expression. Respondents also contended that the injunction's mix of broad

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[3]In this and the three following text paragraphs, the term "respondents" refers to all of the respondents except the Governor of Alabama. Then-Governor Fob James filed a separate appeal, which the Eleventh Circuit rejected, Pet. App. B4. The current Governor, Don Siegelman, joins the other respondents in this Brief in Opposition.

restrictive language and ambiguously defined "safe harbor" exceptions (and exceptions to the exceptions) rendered the injunction impermissibly vague. Finally, respondents argued that considerations of mootness and lack of standing doomed some (but, at that time, not all) of plaintiffs' requests for prospective injunctive relief.

A panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously vacated the Permanent Injunction. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler I*). *See* Pet. App. B1-B26. The panel held that "genuinely student-initiated religious speech . . . is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." Pet. App. B15. The panel condemned the "discriminatory suppression of student-initiated religious speech," *id.* B14; *accord id.* B13, B23-B24, while noting that a "school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech," *id.* B25. Because the Permanent Injunction forbade DeKalb from "permitting" students to "speak religiously," the panel concluded the injunction unconstitutionally required DeKalb to engage in discriminatory suppression of student religious speech. *Id.* B25. Accordingly, the panel vacated the Permanent Injunction and remanded for further proceedings. *Id.* B26. "We do not undertake to re-write the Permanent Injunction," the panel explained. "The district court is in the best position to do that." *Id.* B25.

Given its disposition of the appeal, the panel had no occasion to address respondents' vagueness arguments or to examine, in the first instance, to what extent considerations of mootness and standing might limit the relief Chandler could obtain.

The Eleventh Circuit denied rehearing and rehearing en banc. *See* Pet. App. A2.

Chandler filed a petition for certiorari. After this Court subsequently announced its decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), this Court summarily granted the petition in *Chandler I*, vacated the judgment of the Eleventh Circuit, and remanded the case for further consideration in light of *Santa Fe*. *See Chandler v. Siegelman*, 530 U.S. 1256 (2000) (Pet. App. C1).

On remand, after receiving supplemental briefs from the parties, the Eleventh Circuit panel reinstated its prior judgment. *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (*Chandler II*). *See* Pet. App. A1-A9. The panel explained:

> *Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.

Pet. App. A3 (footnote omitted; emphasis in original). The panel noted that

> *Santa Fe* does not obliterate the distinction between State speech and private speech in the school context. It does not reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse.

Pet. App. A6. Thus, "[w]hat the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a

school-sponsored prayer." Pet. App. A7. The panel reaffirmed that "[s]o long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected[.]" Pet. App. A8 (emphasis in original). Whereas the district court injunction "assumed that virtually any religious speech in schools is attributable to the State," *id.* A6, that injunction was unconstitutionally overbroad: "it eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors." *Id.* A7 (emphasis in original). The panel accordingly reinstated its judgment vacating the district court injunction and remanding for reformulation of the injunction:

> [In *Chandler I*, we] directed the district court to revisit its injunction in order to ensure that it did not command the school district to actively prohibit -- censor -- genuinely student-initiated religious speech, and we do so again.

Pet. App. A8.

The Eleventh Circuit issued its panel decision in *Chandler II* on October 19, 2000. Rather than promptly seeking review in this Court, in light of Jesse Chandler's approaching graduation from high school (and thus from the DeKalb County School System) in May of 2001, Chandler once more petitioned for rehearing en banc. The Eleventh Circuit denied en banc rehearing on April 13, 2001. Pet. App. I1-I2.

Chandler then filed another petition for certiorari.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE TO REVIEW THIS CASE FOR WANT OF AN ARTICLE III CASE OR CONTROVERSY.

This Court should either dismiss or deny the petition for certiorari, *see infra* § VI, in light of the mootness of petitioners' claims.

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citations omitted). This case becomes moot on May 23, 2001, when petitioner Jesse Chandler graduates from the DeKalb County School system. *See supra* at 2. All that the petitioners seek is *prospective* relief against school activities. *Supra* at 1. Those prospective claims plainly lose all vitality once Jesse leaves the school system. *Accord Arizonans*, 520 U.S. at 67. Indeed, petitioners anticipate as much. Pet. at 3 n.1; *id.* at 22.

Furthermore, petitioners will lack standing for the entirety of their claim as of May 23, 2001. Once Jesse graduates, his claim of standing as a student evaporates, as does his father Michael Chandler's derivative right to sue as Jesse's "next friend."

Accordingly, this Court should dismiss the petition for certiorari. In the alternative, this Court should simply deny the

writ because the imminent absence of Article III jurisdiction makes this case unattractive for review.

II. THE QUESTIONS FOR WHICH PETITIONERS SEEK REVIEW ARE NOT PRESENTED IN THIS CASE.

This Court should deny review because the "Questions Presented," for which petitioners seek review, are simply not presented by this case.

In Question One, petitioners attack the Eleventh Circuit for "permitting prayers by students and nonschool persons over the public address system at football games, compulsory school assemblies, and graduation ceremonies and over the classroom intercom," Pet. at i. But the Eleventh Circuit did *not* order such prayers to be permitted; rather, it held that it was unconstitutional *discriminatorily* to prohibit genuinely student-initiated religious speech. Pet. App. A9; *id.* B14-B26. A public school need not "permit" *any* speech by students and nonschool persons at all. But once a public school *does* permit genuinely private speech, it may not discriminatorily censor out speech that is religious. That is the unexceptionable principle that the Eleventh Circuit embraced. *Infra* § IV.

In Question Two, petitioners attack the constitutionality of "group prayer before a captive audience of K-12 students," Pet. at i. This question is not presented. Neither the Permanent Injunction under review, nor the Eleventh Circuit opinions vacating that injunction, purport to address the distinct issues of either "group prayer" or "captive audiences." Rather, the Permanent Injunction restricted religious speech by *any* student, whether engaged in as an individual or together with others.

The injunction was also not limited to "captive" situations. The Eleventh Circuit, overturning the district court, merely directed implementation of the neutrality principle for genuinely student-initiated speech. Petitioners' phrasing of Question Two, then, is a tendentious characterization of a narrow hypothetical, and not a fair description of any question properly presented. Furthermore, Michael Chandler and his *twelfth-grade* son lack standing to seek prospective relief regarding *grades K-11*; in addition, therefore, petitioners cannot press Question Two, as phrased, for jurisdictional reasons.

In sum, neither of the two questions petitioners pose are properly presented here.

III. THE DISTRICT COURT SHOULD BE PERMITTED THE OPPORTUNITY TO REDRAFT THE INJUNCTION IN THE FIRST INSTANCE.

The decision of the Eleventh Circuit in this case is nonfinal. The court of appeals in *Chandler I* vacated the Permanent Injunction but did not "undertake to re-write" that injunction. Pet. App. B25. The court of appeals recognized that "[t]he district court is in the best position to do that [i.e., rewrite the injunction]." *Id.* Accordingly, the court of appeals remanded for further proceedings. *Id.* B26. In *Chandler II*, after remand from this Court, the court of appeals reinstated its prior judgment, once more vacating the injunction and remanding for redrafting. App. A9.

This Court should deny certiorari to allow the district court the opportunity to redraft any injunction that might still be

warranted. This approach makes eminent sense for several reasons.

First, the injunction has to be narrowed in significant respects in any event, which will eliminate much of the scope of the controversy. It would be premature, and an exercise of advisory opinion-making, for this Court to review constitutional issues that likely will be removed from the case on remand.

- Michael Chandler, the lead petitioner, has retired from his position as assistant principal at a DeKalb County high school. Hence, his only basis for seeking prospective relief is as a parent.[4] Michael Chandler's son Jesse, meanwhile, is now a twelfth grader. Any claims for prospective relief -- which is all petitioners seek -- based upon alleged unconstitutional practices in lower grades are now moot.[5]

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[4]Michael Chandler also alleged that he was a taxpayer, Cplt. at 3, but he did not allege or prove that the practices challenged as unconstitutional necessitated any expenditures of tax funds. Consequently, Chandler lacks taxpayer standing. *See Crampton v. Zabriskie*, 101 U.S. 601, 609 (1880) (taxpayer standing requires challenge to a genuine "disposition of the [government] moneys"); *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (for taxpayer standing, it "will not be sufficient to allege an incidental expenditure of tax funds in the administration of [government]"); *Doremus v. Board of Educ.*, 342 U.S. 429, 431-35 (1952) (incidental expenditures insufficient for taxpayer standing).

[5]For example, there is no suggestion that Jesse will ever again encounter Ms. Carroll, his fifth and sixth grade teacher who allegedly solicited student prayer. Cplt. ¶ 16; M. Chandler Aff. ¶ 17. Likewise, Jesse will never more encounter the Gideon's distribution of Bibles to the fifth grade classes. Cplt. ¶ 42; M. Chandler Aff. ¶¶ 21-25. The Gideons have only distributed to the fifth and twelfth grade classes. Cplt. ¶ 44; M. Chandler Aff. ¶ 24. Only the conclusion of the twelfth grade lies ahead for Jesse, and a new

(continued...)

See, e.g., Joint School District No. 241 v. Harris, 515 U.S. 1154 (1995) (vacating and remanding for dismissal, as moot, Establishment Clause challenge to graduation prayer, apparently because student plaintiffs graduated during pendency of case).[6]

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[5](...continued)
DeKalb policy precludes Gideon distribution of Bibles in twelfth grade (and other grade) classrooms. *See* "Distribution of Literature -- Student Rights and Protection" (R. Supp. 1-240, Ex. A) (forbidding "the distribution by . . . nonschool individuals of commercial, political, religious, or promotional materials to students on public school property"); Order (R. Supp. 1-260-1 to 2) (approving policy). Monthly 4-H meetings are held for elementary and junior high school students. Cplt. ¶ 30; M. Chandler Aff. ¶ 26. Concerns regarding these meetings, Cplt. ¶ 29; M. Chandler Aff. ¶ 27-28, became moot when Jesse finished ninth grade in the spring of 1998. Jesse's objection to the D.A.R.E. program for fifth graders, Cplt. ¶¶ 25-27; M. Chandler Aff. ¶¶ 29-32, likewise presents no injury likely to recur. There is no indication that the December 1994 PTO incident -- the coincidence of Jesse's school concert band playing at a meeting which was opened by a prayer, Cplt. ¶ 28; M. Chandler Aff. ¶¶ 34-36 -- is ever likely to recur. The same goes for the two incidents in 1995 in which Jesse received flyers about religious programs or events. Cplt. ¶¶ 45-46; M. Chandler Aff. ¶¶ 37-39. Moreover, the last football season of Jesse's public school career ended months ago, rendering moot his objection to prayers at football games he attends, Cplt. ¶ 19; M. Chandler Aff. ¶ 15.

In sum, the only matters, concerning Jesse, for which there would be any conceivable likelihood of recurrence, appear to be graduation prayers at Fyffe School (the school Jesse was attending, Cplt. ¶ 2), Cplt. ¶ 22; M. Chandler Aff. ¶ 4, and special meeting times or assemblies of Bible clubs at Fyffe School, Cplt. ¶ 49; M. Chandler Aff. ¶¶ 42-44. As to all other matters, mootness precludes relief. Moreover, there is no apparent reason why Jesse would have standing to challenge the Bible club meeting times.

[6]Lower courts likewise dismiss, as moot, Establishment Clause challenges seeking prospective relief from activities in schools which the challengers no longer attend. *E.g., Altman v. Bedford Central School Dist.*,
(continued...)

- The Permanent Injunction improperly granted relief at *all* DeKalb schools, regardless of where Jesse was in attendance. The excessive scope of this relief must be addressed on remand. Lack of Article III standing bars Jesse from seeking relief for activities that do not affect him. "[P]sychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). Thus, Jesse cannot pursue relief at schools he does not attend. *See Lewis v. Casey*, 518 U.S. 343, 357-60 & n.7 (1996) (remedy must be limited to injury shown). Relief for Jesse for schoolday activities must be limited to Fyffe School; relief as to meetings or football games must be limited to those events that involve the Fyffe School Concert Band (of which Jesse was a member) or a Fyffe football team (whose games Jesse attended), or other events at which Jesse is likely to be in attendance. *Accord Lewis*, 508 U.S. at 349 ("It is the role of courts to provide relief to claimants . . . who have suffered, or imminently will suffer, actual harm; it is not the role of courts . . . to shape the institutions of government in such fashion as to comply with the laws and the Constitution").

- The Permanent Injunction is vague in many respects and requires redrafting for clarity. Many examples could be cited. *E.g.*, Pet. App. F5 (allowing students to engage in religious activity only if they do so "quietly" and if the

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[6](...continued)
245 F.3d 49 (2d Cir. 2001); *Doe v. Madison School Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (en banc).

activity "does not unduly call attention thereto"); *id.* F7 (allowing student speakers to include in a graduation address only a "brief personal expression . . . which contains religious references"). (The district court expended considerable ink attempting to explain that its injunction did not mean what its terms apparently stated, Pet. App. D32-D104, and begrudgingly conceded that, at least in part, the injunction "may not be sufficiently narrowly tailored," *id.* D48 n.26 [sic: was n.24 in original, *see supra* note 2].)

Second, the district court is best situated to make the initial determination of how to redraft the injunction. Standing, mootness, and vagueness considerations all have factual dimensions as well as legal dimensions. The district court -- unlike a reviewing court -- can take additional evidence on these issues. The district court can then decide what, if any, prospective relief would represent a properly tailored response to the specific factual circumstances and remaining legal controversies. At that point, any party considering itself aggrieved could seek further review.

Third, Supreme Court review at the present stage would require this Court to address issues not yet addressed or decided below. The Eleventh Circuit did not reach any of the standing, mootness, or vagueness arguments -- by vacating the injunction in its entirety and remanding, the court of appeals did not need to reach these issues. But to uphold the Permanent Injunction -- the relief petitioners seek -- this Court would have to confront and resolve these additional objections to the Permanent Injunction. In particular, this Court would first need to address the threshold jurisdictional questions of standing and mootness.

Given that resolution of these matters should sharply limit the scope of the legal controversy, it makes little sense to grant review at the present stage of proceedings.

In sum, the injunction at issue has been remanded for redrafting. On remand, the district court will need to address the impact of mootness, standing, and vagueness concerns as well as the Eleventh Circuit's opinions below. Should any controversy between the parties remain after remand, any aggrieved party can then seek appellate review. Supreme Court review at this point would be premature.

IV. THE DECISION OF THE ELEVENTH CIRCUIT FAITHFULLY APPLIES THIS COURT'S PRECEDENTS.

The opinions of the Eleventh Circuit in this case faithfully apply this Court's precedents under the First Amendment's speech and religion clauses. Petitioners' attempt to characterize the decision below in a contrary fashion represents a serious distortion and misreading of that court's rulings.

The precise question before the Eleventh Circuit was whether the district court erred by ordering the DeKalb County schools to impose discriminatory restrictions on private religious speech (primarily student speech). Pet. App. A8; *id.* B13. The Eleventh Circuit properly rejected the district court's approach and held that school officials must treat genuinely student-initiated religious speech evenhandedly with student-initiated non-religious speech. *Id.* A9; *id.* B14-B26. This is no more than a straightforward application of this Court's many precedents upholding equal access for, and government

neutrality toward, private religious expression. *E.g.*, *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993).

To say that something -- such as student prayer at school -- is *not always constitutional* is not the same as saying that it is *always unconstitutional*. Yet petitioners embrace precisely this logical fallacy. Petitioners take *Santa Fe*'s condemnation of *school-sponsored* student prayer, and twist it into a prohibition on student prayer *regardless* of school sponsorship. This is simply wrong. "By no means do [the Religion Clauses of the First Amendment] impose a prohibition on all religious activity in our public schools." *Santa Fe*, 530 U.S. at 313. Furthermore, petitioners' approach ignores the great sensitivity to varying factual contexts that characterize this Court's Establishment Clause jurisprudence. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("no fixed, per se rule can be framed"); *id.* at 694 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances").

Petitioners' approach profoundly misreads *Santa Fe*, which reaffirmed this Court's careful attention to the key factual details of Establishment Clause cases. Indeed, *Santa Fe* expressly recognized that, even in the context of religious messages which are "authorized by a government policy and take place on government property at government-sponsored school-related events, . . . *not every message delivered under such circumstances is the government's own.*" 530 U.S. at 320 (emphasis added). There is obviously a world of constitutional difference between, on the one hand, a school official

instructing Sally Jones to deliver "the invocation" at a school talent show, and on the other hand, Sally Jones choosing to sing "Amazing Grace" for her part in the talent show. The latter speech is genuinely student-initiated, not in the sense that she composed the words -- she did not -- but because the factual context clearly indicates that any religious content is solely attributable to the student, not the school.[7]

The Eleventh Circuit vacated the permanent injunction because that injunction unconstitutionally went well beyond the prohibition of school sponsorship of prayer. *See* Pet. App. F4-F5 (injunction purports to ban only "permitting school organized or officially sanctioned religious activity" but goes on to restrict even quiet student religious activity during non-instructional times), F6-F8 (restricting student religious speech at graduation regardless of school sponsorship), F8-F10 (restricting student religious speech at school assemblies and sporting events, and over any public address system during the instructional day, regardless of school sponsorship), F10-F12 (restricting religious literature distribution regardless of school sponsorship).

The Eleventh Circuit did *not* hold that schools must affirmatively allow religious speech by students or nonstudents, contrary to petitioners' assertion, Pet. at 8 n.3, 10. Rather, the Eleventh Circuit merely held that, if and when school officials permit genuinely student-initiated nonreligious speech, those officials must treat private religious speech evenhandedly. As the court of appeals explained:

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[7]Petitioners therefore err badly by equating "genuineness" with "unscripted." Pet. at 12 n.7. The Eleventh Circuit said no such thing. This is a straw man of petitioners' own making.

> A student's right to speak religiously is not . . . without limit. The school may impose the same reasonable restrictions on the time, place, and manner of religious speech as it does on secular student speech.

Pet. App. B24.

The Eleventh Circuit did *not* limit the category of "state action" to speech "uttered by a school official," contrary to petitioners' assertion, Pet. at 11. Rather, the Eleventh Circuit held that the Establishment Clause proscribes a range of activities that fall within the scope of "state action," including

- state creation of an exclusively religious forum for private speakers, Pet. App. B9; and,

- active endorsement, encouragement, or participation by the state regarding student religious speech, Pet. App. B21-B23 & n.19.

This approach is completely consistent with *Santa Fe*.

In sum, petitioners misleadingly attempt to depict the decision below as extreme and outrageous, as if the ruling somehow allowed would-be religious speakers the right to burst into classrooms and lead prayer while the teacher cowered in the corner. Quite to the contrary, the decision below gives genuinely private religious speech no greater privilege than genuinely private nonreligious speech.

V. THERE IS NO CONFLICT IN THE CIRCUITS WARRANTING REVIEW.

Petitioners assert a "direct conflict" between the decision below and the decisions of other circuits. This is not accurate. The only decision that arguably conflicts with the decision below is the Ninth Circuit's decision in *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), *cert. denied sub nom. Niemeyer v. Oroville Union High School*, 121 S. Ct. 1228 (2001), and that is because *Cole* mistakenly reads *Santa Fe* as requiring a school, on the specific factual record at issue there, discriminatorily to censor out student religious speech at graduation ceremonies. *See* 228 F.3d at 1101-04. Any conflict between *Cole* and the decisions below is limited both to the issue of student religious speech at graduation and to the particular factual context of *Cole*. Moreover, this Court has already denied certiorari in *Cole*, regardless of any supposed conflict between *Cole* and *Chandler* on that issue. *See Niemeyer v. Oroville Union High School*, No. 00-1074 (U.S. cert. denied Mar. 5, 2001).

A. The Limited and Arguable Conflict with *Cole v. Oroville Union* Does Not Warrant Review.

No alleged conflict with the Ninth Circuit's decision in *Cole* warrants Supreme Court review.

Cole held that the Establishment Clause required a school to censor the religious content of one student's invocation, and another student's valedictory speech, at a high school graduation. *Cole* turned on the fact-bound conclusion that, under the specific circumstances of that case, the student

addresses in question "would not have been private speech," but rather would have been "attributable to the [School] District," 228 F.3d at 1102-03. The *Cole* court placed particular emphasis upon the school's supervision and approval of the content of student speakers' messages. *Id.* The Eleventh Circuit in the case at bar, by contrast, specifically disallowed school supervision of the religious content of student speech. Pet. App. B23. Furthermore, the present case involves a sweeping district court injunction that imposed categorical restrictions and disregarded factual particulars. The Eleventh Circuit concluded that the injunction was overbroad and needed to be drafted more narrowly. *Cole* is thus clearly distinguishable from the present case.

This Court has already denied certiorari in *Cole*, and as described above, the Eleventh Circuit's resolution of the questions before it in the present case was plainly correct. Denial of review here will allow the lower courts to sharpen -- or resolve -- any lingering apparent tension between the circuits' arguably varying interpretations of *Santa Fe*. In any event, the impending mootness of the present case makes it an especially poor vehicle for resolving any supposed constitutional conflicts on the merits.

B. The Decision Below Does Not Conflict with Any Other Circuits.

Petitioners assert a conflict between the Eleventh Circuit's decision in this case and various decisions of other circuits. These supposed conflicts are specious, as the Eleventh Circuit itself already explained. *See* Pet. App. B9, B21-B22 & n.18. None of these other cases contradict the principle set forth by

the Eleventh Circuit: that schools may not constitutionally impose *discriminatory* restrictions on *genuinely student-initiated* religious speech.

Thus, in *Collins v. Chandler Unified School District*, 644 F.2d 759, 760-61 (9th Cir. 1981), the government policy favored religion by specifically authorizing prayers. In the case at bar, by contrast, the injunctive ban on "permitting" student religious speech commits precisely the opposite constitutional error: uniquely *disfavoring* private religious expression.

In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc), the school policy gave the student body the option of voting explicitly for prayer, *id.* at 1475. The Third Circuit faulted this policy for enabling a plurality of the student body to compel prayer at graduation. *Id.* at 1477. The present case concerns no such "vote-for-prayer" policy.

In *Berger v. Renssalaer Central School Corporation*, 982 F.2d 160 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993), school policy gave the principal and superintendent total discretion to grant or deny permission to outside speakers to distribute literature or publications to students, 982 F.2d at 1162-63. Such discretion is no guarantee of neutrality, and in fact can mask its opposite. The injunction in this case, by contrast, *required* school officials to discriminate against religious expression.

In *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), the Second Circuit assumed that *permitting* prayers would *not* violate the Establishment Clause,

and simply held that the Free Speech and Free Exercise Clauses conferred no *special right* to interrupt the school day with prayer, 348 F.2d at 1001-02.

None of these cases advance Chandler's arguments.

VI. PETITIONERS ARE NOT ENTITLED TO VACATUR OF THE DECISION BELOW.

Petitioners mention, in passing, that if this case becomes moot, petitioners request this Court to vacate the decisions below. Pet. at 3 n.1, 22. This request should be denied.

As this Court recently -- and unanimously -- explained, "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortgage Corp. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994). Petitioners in the present case have shown no such entitlement to vacatur.

First of all, for the reasons set forth elsewhere herein, the petition for certiorari should be either dismissed (for want of jurisdiction) or denied. Whereas a grant of certiorari is "a precondition for our vacatur," *U.S. Bancorp*, 513 U.S. at 28, petitioners would therefore not be entitled to vacatur. *See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 724 (7th ed. 1993) ("since 1978, the Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of

review. In such cases the Court will merely deny certiorari") (footnote omitted).

Second, petitioners are themselves responsible for the fact that this case will become moot before this Court could afford plenary review. The Eleventh Circuit issued its panel decision on remand on October 19, 2000. At that point, petitioners still had ample time to petition for certiorari and have the case heard this Term (i.e., before Jesse Chandler graduated on May 23, 2001). Petitioners chose not to do so. Instead, petitioners requested en banc review, which the Eleventh Circuit did not deny until April 13, 2000, a date far too late to allow for Supreme Court review, in the normal course, for this Term.

Petitioners could have declined to seek en banc review. They did not. Petitioners could have withdrawn their request for en banc review when an order did not issue within a month or two. They did not. Petitioners could even have requested expedited review in this Court. *See, e.g., Bush v. Gore*, 531 U.S. 9 (2000). They did not. Instead, petitioners sat by while the opportunity for Supreme Court review slipped away. This "voluntary forfeiture of review constitutes a failure of equity," *U.S. Bancorp*, 513 U.S. at 26. Hence, petitioners have failed to meet the burden of demonstrating "equitable entitlement to the extraordinary remedy of vacatur." *Id.*[8]

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[8]Were this Court nevertheless to conclude that vacatur is warranted, the proper course would be "vacatur down the line," *Arizonans for Official English*, 520 U.S. at 75, i.e., including the district court's rulings regarding the permanent injunction.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

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No. 00-1606

In The
Supreme Court of the United States

MICHAEL CHANDLER, individually and as father and next friend of JESSE CHANDLER,

Petitioners,

vs.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Rather than following *Santa Fe's* proscription of prayers at "government sponsored, school-related events" that involve "both perceived and actual endorsement of religion" and that put "school-age children who object in an untenable position," *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 305 (2000), the Eleventh Circuit allows exactly such prayer.

Petitioners acknowledge that minor plaintiff Jesse Chandler graduated May 23, but they vigorously dispute Respondents' contention that his graduation renders this matter unjusticiable. This Court has not allowed mootness to be invoked to preserve an unjust ruling or one with untenable legal consequences. This Court should grant the writ and vacate the Eleventh Circuit's decisions.[1]

I. THIS CASE IS JUSTICIABLE DESPITE JESSE CHANDLER'S GRADUATION.

28 U.S.C. § 2106 provides that this Court may "vacate, set aside or reverse" any judgment, direct entry of judgment, or require further proceedings "as may be just under the circumstances." Where the petitioner has not brought mootness on himself, this Court may exercise its supervisory powers, including "commonly utilized"

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[1] Respondents' appeal is limited to selected portions of the injunction and is not addressed to the district court's other rulings. (Resp. Br. at 4.) These nonappealed rulings are not subject to vacatur, as Respondents acknowledge. (Resp. Br. at 23 n.8.) Respondents acknowledge that they did not challenge the ruling that the student-initiated prayer statute was unconstitutional. (Resp. Br. at 4.) Nor did they challenge any factual findings of the district court. (Opening Br. in 11th Cir. at 4.)

vacatur orders, "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40, 41 (1950). *Accord Sibron v. N.Y.*, 392 U.S. 40, 58-59 (1968) (Court will vacate appellate decisions despite intervening mootness due to its "obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to ... the Constitution") (citations omitted).[2]

Despite intervening mootness, this Court will "make such disposition of the whole case as justice may require." *Walling v. Reuter*, 321 U.S. 671, 677-78 (1944). Whether the Court exercises its supervisory power to vacate all proceedings or none, it must choose the course "most consonant to justice." *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U.S. 476, 477-78 (1916).

While Respondents correctly suggest that this Court will not entertain exceptions to mootness for parties who slumber on their rights, *see Munsingwear*, 340 U.S. at 41, they are incorrect in suggesting that Petitioners did so. This Court does not censure parties for attempting to persuade their circuit courts to correct their own errors before

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[2] *See also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 463 (6th Cir. 1997) (declining to find mootness despite plaintiff's graduation where that would "give the green light" to school districts to violate rules and thereby create "a highly unfavorable precedent"); *Boise City Irrig. & Land Co. v. Clark*, 131 F. 415 (9th Cir. 1904) (taking jurisdiction despite intervening mootness to assure correct application of law).

bringing them here–quite the contrary. *See Wisniewski v. U.S.*, 333 U.S. 901, 902 (1957) (*per curiam*). As the dissent from the denial of *rehearing en banc* underscores, plaintiffs had every right to expect that the full Circuit would correctly apply *Santa Fe* following remand, even if the panel would not. (*See* Corrected Order of April 13, 2001 denying *reh'g en banc*) (Barkett, J., dissenting).) On April 19, 2001, three days after receiving the order denying rehearing, counsel sent the petition to the printer for filing. This is not slumbering on one's rights.[3]

II. RESPONDENTS' THEORIES OF STANDING ARE INCORRECT.

Respondents' argument that Jesse Chandler's relief is limited to his home school, Fyffe, was presented to the Court of Appeals, which found it unworthy of attention. Still, Respondents claim this case is a factual morass when

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[3] Respondents' reliance on *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) is misplaced. There, the plaintiff voluntarily quit the job that was her sole exposure to the constitutional injury. Jesse Chandler graduated; he did not "take voluntary action [that] moots the dispute," conceal mootness from the Court, and then hope to preserve a judgment in his favor, as in *Arizonans*. *See* 520 U.S. at 75. Respondents are correct, however, that if this Court vacates any part of the injunction for mootness, *Arizonans* "vacatur down the line" directive means that all decisions of the Eleventh Circuit must be vacated as well. (*See* Resp. Br. at 23 n.8.) *See also Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir.), *cert. granted, vacated as moot, Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995).

no fact – as to standing or otherwise – was ever in doubt.[4] *See supra* note 1 (facts conceded).

Respondents overlook that the plaintiffs in *Lee v. Weisman* obtained an injunction against the whole school system, although not every single school offered prayers. *See Weisman v. Lee*, 728 F. Supp. 68, 69 (D.R.I. 1990). Moreover, Jesse should not be penalized for the fact that prayers were so "pervasive and recurrent" (App. E12) that they also occurred at schools besides Fyffe. Perversely, this result is precisely what Respondents' theory entails. (*See* Resp. Br. at 13.)

This aside, Respondents simply mischaracterize the facts. Jesse *personally experienced* every category of school-sponsored prayer and devotional activity the injunction proscribes: prayer at Fyffe graduation, prayer over the intercom at football games, including at Fyffe, prayer in Fyffe classrooms, and prayer, devotionals or Bible readings using the P.A. system in classrooms or school assemblies at Fyffe. (R1-4; App. E21, E32, E37, E64-6, E67-70. *See also* R-1-1, ¶¶ 21, 26-27, 19-33, 34-37, 39). Jesse secured no more than he had standing to seek.

III. THIS CASE IS GOVERNED BY *SANTA FE*, WHICH WAS DISREGARDED.

In Respondents' quest to make this simple case

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[4] If Jesse is mooted by graduation, Respondents' overly constricted view of the standing necessary to secure relief from a systemwide policy is no reason, as they urge, to deny the writ–for findings on standing in the district court or elsewhere would in such event be superfluous.

appear factually complex and thereby deflect *certiorari*, they mischaracterize the record and the injunction. While conceding on appeal all factual findings of the district court, they now claim that the trial court "disregarded factual particulars." (Resp. Br. at 20.) It is in fact the Respondents and the Eleventh Circuit that ignore the facts, facts that establish "school-sponsored," not "private," prayer and facts that fall within *Santa Fe's* proscriptions, which the appellate court should have, but did not, note.

The school board *stipulated* that graduation exercises are "school-sponsored events for which school principals and other school officials make the ultimate decisions as to the format of the ceremony." (E45-46, E50.) Moreover, "[t]he graduation services held in each of DeKalb County's eight high schools regularly incorporate religious invocations and/or benedictions," which has meant prayers ending "in Jesus' name." (App. E48-49; E25-26.) These facts were ignored.

Likewise, since 1985, prayer over the P.A. system at football games, characterized by the superintendent as a "tradition," was sponsored. The school board *stipulated* to its control over home football games, access to the P.A. system, the ultimate supervision of high school principals, and that high school football games and other athletic events do occur on school property. (App. E31, E45.)

Respondents, like the Eleventh Circuit, fail to recount the frank truth that special prayer time is set aside by DeKalb *school officials*, even though students speak the prayers. Prayer, and no other speech, is privileged. School officials control the format of the ceremony and provide for "invocations" and "benedictions," as graduation

programs reflect.[5] Curtailing school officials from inserting prayer into graduations, football games, classrooms or assemblies is not discrimination against "genuinely student-initiated prayer" or religious references. (Resp. Br. at 9.) *Santa Fe* and the district court recognized this difference. (*But see* App. A7, B24.)

The district court understood, in graduation and all other contexts, that some prayer and religious expression *is* private–and took great pains to reach only "*school-organized*" or "*officially sanctioned religious activity.*" (App. F) (emphasis in injunction). *See also* dissent from denial of *reh'g en banc*.) It proscribed only prayer using the machinery of the state, such as the P.A. system, at school-sponsored assemblies and events. (App. F.)

Yet the Eleventh Circuit, on remand, continued to insist that prayer of the sort here and in *Santa Fe*–prayer "delivered to a large audience assembled as a part of a regularly scheduled, school-sponsored function conducted on school property"or "broadcast over the school's public-address system, which remains subject to the control of school officials"–is "private" prayer.[6] *Compare* 530 U.S.

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[5] *See, e.g.*, App. E49. The district court was aware that valedictory and other speeches proceed independently of the invocations and benedictions. It found that proscriptions on such school-sponsored prayer do not affect "a valedictorian's expressive right to make a brief reference to Deity in a valediction." (App. E54). Its injunction says the same. (App. F6-7 & n.1.) This is not antireligious discrimination.

[6] *Santa Fe* explicitly rejected the argument, embraced by the Eleventh Circuit, that school officials' permitting other speech

at 300-01, 307-09 *with* A5-6. There is no principled way to avoid the fact that the prayers in DeKalb County have borne the imprint of the state as surely as the prayers in *Santa Fe* did: they were recited using school facilities and microphones, delivered to school audiences, at school events. The Eleventh Circuit acknowledges that these were the indicia of school-sponsored prayer in *Santa Fe*,[7] but could not see those same indicia of sponsorship in *Chandler*. It could not see or it ignored both the facts and the difference between an Establishment Clause violation and "viewpoint discrimination" and censorship. (*See* A8.) Its blindness is serious--it has ignored the very text of an injunction that explicitly protects truly private religious speech, in just the manner that *Santa Fe* does.[8]

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besides prayer meant that permitting prayer was merely a "neutral accommodation of non-coerced, private, religious speech." (App. B.) Contrary to Respondents' misrepresentation, *see* Resp. Br. at 16, *Santa Fe* did anything *but* apply *Mergens* to a case about praying over the P.A. system at school-sponsored events. What the Court actually said, in rejecting *Mergens* in the school-sponsored prayer context, is: "[W]e are not persuaded that the pregame invocations should be regarded as 'private speech.'" *Santa Fe*, 530 U.S. at 302. Yet *Mergens* dominates the Eleventh Circuit's rulings.

[7] "What the court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer." *See* A7. Petitioners agree, as would the district court.

[8] *Compare* App. D (sections beginning "THIS PERMANENT INJUNCTION DOES NOT") *with Chandler II's* characterization of injunction ("It eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors."). The Eleventh Circuit can reach

The Eleventh Circuit ignores the facts that undergird the injunction and refuses to read it in its entirety, plucking language out of context and severing remedial provisions from the facts that are their genesis. Contrary to the Eleventh Circuit, the injunction does not *censor* permissible speech or "impose discriminatory restrictions on private religious speech" any more than *Santa Fe* does. (App. A8; Resp. Br. at 15.)[9]

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this conclusion only because it believes, contrary to *Santa Fe*, that prayers delivered over the P.A. system to captive students are somehow private because no school official delivers them. This Court has ruled otherwise.

[9] It is ironic that Respondents, who purport to champion students' speech rights, here falsely deride the injunction's express protections of these rights as "exceptions to exceptions." (Resp. Br. at 2.) The injunction is straightforward. It excepts from its reach all Equal Access Act rights; the appropriate use of religious texts in the classroom; students' voluntary expression of religious belief in homework and other assignments; the display of religious symbols and wearing of religious clothing or jewelry; student distribution of religious materials; the rights of students to persuade their peers on religious topics; and the announcement of noncurricular religious club meetings. (App. F.) Under the injunction, Sally Jones may in fact sing "Amazing Grace" at a talent show, based on the protection for expression of her religious beliefs in assignments, contrary to Respondents' speculation. (*See* Resp. Br. at 17.) This is not the first time Respondents have substituted rhetoric for a reasonable reading. Indeed, the district court thoughtfully rejected every similarly tortured hypothetical that Respondents presented when they asked it to stay its injunction. (App. D.) The district court in that ruling did not pronounce its injunction "insufficiently tailored"; it stayed exactly 12 words of its 3,714 word injunction. (*Compare* App. D3, D47, n.26 *with* Resp. Br. at 14.)

Rather, the injunction, like *Santa Fe*, defines a sphere for private student speech which school officials may not transgress and a sphere of school-sponsored prayer that, because of the setting and audience, conveys a message of official endorsement and coerces listeners. The Eleventh Circuit's opinions are exactly contrary to *Santa Fe*, and no amount of argument or apologia can change this fact.

It is an injustice to the Chandlers and a violence to the law to misread an injunction that bends over backwards to preserve student religious rights as one forbidding them "to speak religiously in any sort of public context." (App. A9.) The injunction enjoins, on its face, "school-sponsored" prayer. (App. F.) Any honest application of *Santa Fe* here must recognize this fact.

This Court in *Santa Fe* did not rest its decision on discrete aspects of a majority-vote or putative equal-access policy, the basis on which the Eleventh Circuit on remand found *Santa Fe* distinguishable from this case. (*Compare* App. A3-4 *with* 530 U.S. at 307 ("the actual or perceived endorsement of the message is established by facts beyond just the text of the policy.").)[10]

Because the Eleventh Circuit decision did not distinguish but instead conflated school-sponsored with private prayer and ignored the essence of *Santa Fe's* ruling on both endorsement and coercion, it requires the district

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[10] Here, there is not even a pretense of an equal-access-for-secular-speech policy such as existed in *Santa Fe*–the school board has flat-out inserted the prayers into programs it controls. Any insinuation otherwise derives from imagination.

court on remand to enter an unconstitutional order.[11] No district court can follow the Eleventh Circuit's command without disregarding this Court's school-prayer precedents.

CONCLUSION

The Court has broad supervisory power under § 2106 to resolve a case justly and also to prevent evisceration of its precedents. The Eleventh Circuit decisions must be vacated for all of the reasons stated in the petition and herein.

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[11] It even ignores the distinction between public and other fora, allowing nonstudents to use the state's P.A. system and audience for prayer. (App. B6 at n.6; B22, B25.) No amount of disavowal by Respondents will retract this holding. No amount of argument that the Eleventh Circuit never explicitly *said* schools are public fora will change the fact that it conferred rights on nonstudents to pray over the school's P.A. system at school-sponsored events. No amount of argument will change the fact that no other court has conferred such an extraordinary right in our nation's schools.

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